Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in extending deference to the Commerce Department's interpretation of Section 772(a)(1)(C) of the Tariff Act of 1930, as amended, when the words of the statute make it clear that Congress intended United States Price to be tax-inclusive only to the extent Foreign Market Value is shown by a foreign respondent likewise to be tax-inclusive.

2. Whether an interpretation of Section 772(d)(1)(C) offered on appeal by the Department of Justice is entitled to deference by a reviewing court where that interpretation flatly contradicts interpretations previously announced by the client agency itself in formal administrative proceedings and where the interpretation is inconsistent with the plain meaning of the words used in the statute.

3. Whether the Federal Circuit erred in extending deference to the Commerce Department's interpretation of Section 737(a) of the Tariff Act of 1930, as amended, that a cap may be placed on the financial liability of foreign respondents for the payment of antidumping duties secured by bonds on merchandise imported during the period of the original antidumping investigation, when the express terms of the statute extend that cap only to obligations secured by cash deposits.

RULE 29.1 STATEMENT

The International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, International Brotherhood of Electrical Workers, and the Industrial Union Department, AFL-CIO, are domestic labor organizations representing workers who are engaged in the manufacture in the United States of color television receivers.* None of the labor organizations is a publicly owned corporation that issues shares to the public.

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* Parties to the proceeding whose names do not appear in the caption of the case are Zenith Electronics Corporation; Samsung Electronics Co., Ltd.; Samsung Electronics America, Inc.; Daewoo Electronics Co., Ltd.; Daewoo Electronics Corp. of America, Inc.; Goldstar Co., Ltd; and Goldstar Electronics International, Inc.

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INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO,

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, International Brotherhood of Electrical Workers, and Industrial Union Department, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal

Circuit, entered in the above proceeding on September 30, 1993, rehearing denied, November 18, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, *Daewoo Elecs. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO* ("*Daewoo IV*"), is reported at 6 F.3d 1511 (Fed. Cir. 1993) and is reprinted at pages 3-34 of the appendix to this petition ("Pet. App."). On November 18, 1993, the Court of Appeals for the Federal Circuit denied the Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc. The order is reprinted at pages 1 to 3 of Pet. App. The Federal Circuit overturned decisions of the United States Court of International Trade in *Daewoo Elecs. Co. v. United States*, 712 F. Supp. 931 (Ct. Int'l Trade 1989) ("*Daewoo I*") and *Daewoo Elecs. Co. v. United States*, 794 F. Supp. 389 (Ct. Int'l Trade 1992) ("*Daewoo III*"). The opinion of the Court of International Trade in *Daewoo I* is reprinted at 69-138 of Pet. App.; the opinion of the Court of International Trade in *Daewoo III* is reprinted at pages 35-44 of Pet. App. The opinion of the Court of International Trade in *Daewoo Elecs. Co. v. United States*, 760 F. Supp. 200 (Ct. Int'l Trade 1991) ("*Daewoo II*") is reprinted at pages 45-68 of Pet. App.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on September 30, 1993. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied

on November 18, 1993. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 772(d)(1)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677a(d)(1)(C) (1988), provides in pertinent part as follows:

> The purchase price and the exporter's sales price shall be adjusted by being . . . increased by . . . the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

Section 737(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673f(a) (1988), provides as follows:

> If the amount of a cash deposit collected as security for an estimated antidumping duty under section 1673b(d)(2) of this title is different from the amount of the antidumping duty determined under an antidumping duty order issued under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be –

(1) disregarded, to the extent that the cash deposit collected is lower than the duty under the order, or

(2) refunded, to the extent the cash deposit is higher than the duty under the order.

STATEMENT OF THE CASE

1. The U.S. Antidumping Law

The U.S. antidumping law requires the assessment of antidumping duties if two conditions are met: (1) the International Trade Administration of the U.S. Department of Commerce (hereinafter "the Department" or "the ITA") determines that the imported merchandise is being sold at less than fair value; and (2) the U.S. International Trade Commission (hereinafter "the ITC") determines that a U.S. industry is materially injured or threatened with material injury by reason of imports of that merchandise. 19 U.S.C. § 1673 (1988). If the Department determines that less than fair value sales exist and the ITC makes an affirmative injury determination, an antidumping duty order is issued. Imported merchandise covered by such an order is subject to the imposition of a special antidumping duty equal to the amount by which Foreign Market Value exceeds the United States Price for the merchandise. 19 U.S.C. § 1675(a) (1988). This amount is referred to as the "dumping margin."

This case involves the methodology specified in the antidumping law to adjust for indirect taxes which are imposed on sales in the country of exportation, but which are rebated, or forgiven, on exports to the United States.

An adjustment in the price comparison is necessary to ensure that a dumping margin is not created solely because a tax-inclusive Foreign Market Value is compared to a tax-exclusive United States Price. In 1921, Congress incorporated a provision in the antidumping law designed to adjust for the absence of tax in United States Price by adding to that price an amount equal to the tax that would have been imposed on the merchandise but for the fact of exportation.

An upward adjustment to United States Price tends to lower a potential margin of dumping by narrowing the difference between the Foreign Market Value and the relatively lower United States Price. In 1974, Congress amended the law by placing limitations on the upward adjustment to United States Price with respect to this tax adjustment. The law as presently written provides for an upward adjustment to United States Price by:

> [T]he amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, *but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation*; . . . .

Section 772(d)(1)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677a(d)(1)(C) (1988) (emphasis added). By limiting the upward adjustment to United States Price, Congress ensured that margins of dumping would not be reduced in cases where the full amount of the tax was not included in Foreign Market Value.

This case also involves the question of how much antidumping duties may be collected for entries of merchandise imported during the original antidumping investigation before an antidumping duty order has been published. Under Section 733(d)(2) of the Act, foreign respondents must secure their obligations to pay antidumping duties during this period either by posting a bond or by making cash deposits in an amount equal to the estimated duty. 19 U.S.C. § 1673b(d)(2) (1988). Korean companies covered their estimated duty obligations for this period by posting bonds rather than by making cash deposits. Pet. App. 28. Section 737(a) limits the antidumping liability on such entries and expressly states that the difference between a *cash deposit* of estimated antidumping duties and the final antidumping duty determined shall be "disregarded, to the extent the *cash deposit* collected is lower than the duty under the order." 19 U.S.C. § 1673f(a) (1988) (emphasis added). No provision is made for the limitation of liability when that liability is secured by bonds.

2. Proceedings Before The International Trade Administration

Petitioners are labor organizations who represent workers engaged in the manufacture of color television receivers ("CTVs") in the United States. On May 2, 1983, Petitioners filed a petition seeking relief under the antidumping law from the harmful effects of dumped imports of CTVs from Korea. During the original antidumping investigation, the Petitioners argued that measurement of home market taxes was required by the statute to ascertain the extent to which Foreign Market

Value was tax-inclusive before any upward adjustment to United States Price is made under Section 772(d)(1)(C). The Department conceded the correctness of this position, but nevertheless failed to follow the statute:

> [I]t is only reasonable to conclude that the Congress, in its addition to section 772(d)(1)(C) of the "but only to the extent" language, intended that we measure absorption and limit the addition to the tax passed through. However, it is impossible to do so . . . . [thus] the Department has presumed full pass through in this investigation.

Final Determination of Sales at Less Than Fair Value; Color Television Receivers from Korea, 49 Fed. Reg. 7620, 7624 (Mar. 1, 1984). The Department "presumed full pass through" in the original investigation and failed to undertake any measurement of tax included in the price of the sale in the Korean home market. Nevertheless, the Department issued an antidumping duty order against CTVs from Korea. *Antidumping Duty Order; Color Television Receivers from Korea*, 49 Fed. Reg. 18,336 (April 30, 1984).

Thereafter, the Department initiated an administrative review of antidumping duties under Section 751(a) of the Act, 19 U.S.C. § 1675(a) (1988). During this first annual review, the Department once again conceded that the statute required that the amount of the upward adjustment to United States Price should be limited to the amount of tax actually included in the price to purchasers in the home market. Nevertheless, the Department failed to conduct such a measurement and instead "assumed full pass-through" of the taxes. *Color Television Receivers from Korea; Final Results of Administrative Review of*

Antidumping Duty Order, 49 Fed. Reg. 50,420, 50,421 (Dec. 28, 1984). The Department found that the three Korean CTV manufacturers under review, Daewoo, Goldstar, and Samsung, were dumping CTVs in the United States at margins of 14.88 percent, 7.47 percent, and 12.23 percent, respectively. The Department's final determination in this first administrative review is the subject of this litigation.

3. Proceedings Before The U.S. Court Of International Trade

Petitioners filed an appeal with the U.S. Court of International Trade challenging the determination by the Department that it was free to assume that 100 percent of the taxes had been included in the foreign market price. Petitioners, relying on the plain meaning of the words of the statute, contended that the Department is obliged to limit the upward adjustment to United States Price on account of taxes included in the Foreign Market Value by measuring "the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." 19 U.S.C. § 1677a(d)(1)(C) (1988). The Court of International Trade found that the Department's contrary interpretation of Section 772(d)(1)(C) was "not in accordance with the law." *Daewoo I*, Pet. App. 125.

Application of Section 772(d)(1)(C) necessarily involves two separate questions. The first concerns whether this statutory provision requires the ITA to measure the extent to which Foreign Market Value is tax-inclusive. If this first question is answered in the affirmative, the second question asks how this measurement is to be made. In *Daewoo I*, the Court found that Section

772(d)(1)(C) requires such a measurement. The Court did not attempt to resolve the second question. Rather, it remanded the proceeding to the ITA so that it could determine *how* that measurement was to be made. Thus, the opinion in *Daewoo I* clearly states:

> The Court finds that the *Zenith* case is controlling in its holding and reasoning that Commerce's interpretation of Section 772(d)(1)(C) of the Act is not in accordance with the law and that the final results of this administrative review are not supported by the evidence on the record with regard to this issue. The Court remands this issue to the ITA for reconsideration in accordance with this opinion.

Pet. App. 125. The opinion of Senior Judge Watson in *Zenith Elecs. Corp. v. United States*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), which served as the bedrock upon which *Daewoo I* rests, states as follows:

> Although § 1677a(d)(1)(C) requires the ITA to measure actual tax absorption, it leaves the precise method of performing this measurement to the discretion of the agency.
>
> . . . .
>
> . . . [t]he *agency* must find a methodology for measuring absorption which it considers satisfactory and must base its measurements upon substantial evidence.
>
> The court leaves open whether the simple method of subtracting after-invoice discounts and rebates from gross invoice prices, suggested by Zenith and the Unions below, is sufficient, or whether an econometric approach is required. . . .

633 F. Supp. at 1400.

On remand following *Daewoo I*, the ITA elected to embark upon an econometric analysis of tax incidence in the Korean color television market. On the basis of its econometric analysis, the ITA concluded that the full amount of the taxes imposed on Korean televisions in the home market was included in the price paid and that no limitation on the upward adjustment to United States Price was necessary under Section 772(d)(1)(C). The results of this first remand were before the Court of International Trade in *Daewoo II*. The Court of International Trade evaluated the econometric analysis undertaken by the ITA and found that it was not supported by substantial evidence. Pet. App. 57-59. The Court gave specific instructions to the ITA respecting legal and evidentiary deficiencies in its econometric analysis. *Id.* It is important to note, however, that those instructions came only after the ITA had decided to use an econometric analysis to measure the extent to which indirect taxes were included in the home market price. The instructions of the Court of International Trade in *Daewoo II* should not be confused as a directive to the ITA to use an econometric approach.

During the second remand following *Daewoo II*, the ITA continued to follow the econometric approach begun in the first remand. Korean respondents tried to support the first remand result with additional evidence and expert econometric analysis. Eventually, Korean respondents abandoned their analysis and offered a totally different approach, which they believed would still support a finding that 100 percent of the home market taxes were included in the foreign market price. Commerce concluded that this second analysis was flawed and decided

to base its tax measurement on an analysis advanced by an expert witness offered by Zenith Electronics Corp., a domestic producer of color televisions. Pet. App. 13.

Daewoo III followed the second remand determination. The Court of International Trade accepted the results of the second remand, which had found that less than 100 percent of the taxes imposed in the Korean home market were included in the foreign market price of the merchandise. Accordingly, the amount of the upward adjustment to United States Price required under Section 772(d)(1)(C) became smaller, and the margin of dumping for the principal Korean color television producers went up substantially.[1]

4. The Appeal To The Federal Circuit

a. The Adjustment to United States Price for Indirect Taxes

The ITA appealed the decisions of the Court of International Trade in *Daewoo I* and *Daewoo III*. It did not appeal directly from *Daewoo II*. On appeal to the Court of Appeals for the Federal Circuit, that Court seriously misapprehended the nature of the decision of the lower court in *Daewoo I*:

> We address the propriety of the following holdings in the *Daewoo* opinions: that 19 U.S.C. § 1677a(d)(1)(C) of the antidumping law

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[1] The *ad valorem* margins of dumping for Daewoo, Goldstar, and Samsung grew from 14.88, 7.47, and 12.23 percent, respectively, in the Department's original finding to 48.18, 33.95, and 30.36 percent, respectively. Pet. App. 7.

> requires that ITA make an econometric analysis of tax incidence in foreign markets (*Daewoo I*). . . .

Pet. App. 7-8.

The Federal Circuit overturned the finding of the Court of International Trade that the plain meaning of Section 772(d)(1)(C) required the ITA to measure taxes in the home market. The Federal Circuit's ruling that the ITA is not required to measure tax incidence is based largely on the perceived inadequacies and burdens of the econometric approach selected by Commerce. Pet. App. 12, 21-22. The Federal Circuit deferred to the Department's interpretation of Section 772(d)(1)(C), noting that it "has recognized the ITA as the 'master' of [the] antidumping law" and that the tenets expressed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, *reh'g denied*, 468 U.S. 1227 (1984), "extend to their limits when the ITA interprets the antidumping laws." Pet. App. 16.

The Federal Circuit's decision to defer to the ITA's interpretation under the principles set forth in *Chevron* was plainly wrong. The rule in *Chevron* requires a two-part analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *First*, always, *is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter;* for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not

> directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.* (footnotes omitted).

467 U.S. at 842-43 (emphasis added).

The Federal Circuit bypassed completely step one of the *Chevron* analysis, never addressing the critical question of whether the statute is ambiguous or open to more than one interpretation. Had the Federal Circuit undertaken step one of the *Chevron* analysis, it would have seen that the unambiguous wording of Section 772(d)(1)(C) requires the Department to limit the upward adjustment to United States Price by measuring the extent to which taxes are included in the home market price. At the same time, the statute leaves open to the Department's discretion the precise methodology to be used in conducting that measurement. But ambiguity with respect to *how* the tax measurement should be made does not imply ambiguity as to *whether* some measurement should be made.

The Federal Circuit's opinion points to the perceived burdens and shortcomings of the econometric approach taken by the Department on remand following *Daewoo I*. The Federal Circuit mistakenly believed that the Court of International Trade ordered the Department to conduct an econometric analysis in *Daewoo I*:

> The trial court held that the final clause of section 1677a(d)(1)(C), allowing augmentation of

> USP "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation," compelled the ITA to analyze the *consumer tax incidence* of the commodity taxes. Thus, instead of employing an accounting approach that allows USP to be increased by the full amount of the tax levied and paid on home market sales, *the court reasoned that the ITA must undertake an econometric study of the Korean market* to determine the tax incidence, or "pass through," of the commodity taxes upon consumers. (Emphasis added.)

Pet. App. 10-11. As shown above, however, the opinion in *Daewoo I* made it clear that the court ordered only that the Department conduct a measurement of home market taxes. It left the precise methodology for conducting that measurement to the discretion of the Department. *Supra* at 9.

The Federal Circuit also concluded that there is no evidence that Congress intended to effect the kind of revolutionary change in the antidumping law that is necessarily implied by an obligation to conduct an econometric analysis of tax incidence. Therefore, the Federal Circuit asserted that it could not say that the ITA's interpretation contravenes the statute. Pet. App. 20. The fallacy of this argument lies in the assumption that the court in *Daewoo I* read the statute as requiring an econometric analysis. Neither the Court of International Trade nor the Petitioners have ever taken the position that the statute mandates an econometric analysis, although such an analysis is clearly one option for measuring home market taxes. *Supra* at 9. The ITA decided to embark upon an econometric approach even though Petitioners

were urging other alternatives. *Id.* The Federal Circuit's attempt to point to the ITA's own bungled effort at econometrics as proof that no measurement at all is required must be rejected as a misreading of *Daewoo I* and an unacceptable substitute for a step one *Chevron* analysis.

The contention that the Department's only practical alternative on remand following *Daewoo I* was to conduct an econometric analysis is simply incorrect. The Court of International Trade made reference to Petitioners' concerns over the tax treatment of after-sale discounts and rebates. *Id.* A measurement based upon simple allocation could easily form the basis for a limitation of the tax adjustment on United States Price.[2] The Department's improvident selection of an econometric approach was a self-inflicted wound which does not relieve it of the responsibility to measure home market taxes and to limit the upward adjustment to United States Price under Section 772(d)(1)(C).

Finally, the Federal Circuit suggests that the ITA has consistently interpreted Section 772(d)(1)(C) to require it merely to "examine customary business records of exporters" to determine whether the tax was included in the price and was paid to the government. Pet. App. 16.

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[2] If a Korean producer sells a color television for $100 plus $50 tax (tax-inclusive sales price = $150) and then gives his customer a $15 post-sale discount or rebate, there are any number of accounting techniques available to determine how much of that $15 discount might be considered tax not included in the price and how much of the net selling price of $135 was tax.

The plain meaning of the statute requires more of the Department than a simple inquiry into whether a tax has been paid on the sale in the foreign market. The 1974 amendment that added the language, "but only to the extent that," is robbed of all meaning if no quantitative measurement is required and no limitation on the upward adjustment to United States Price is implemented. If Congress intended to place no restrictions on the amount by which the Department may raise United States Price in the dumping margin calculation, it would not have used language that denotes both measurement and limitation. Even if a longstanding administrative practice existed, this would not permit the Department to ignore the plain meaning of the law.[3]

b. Liability for the Payment of Antidumping Duties Is Not Capped When Payment Is Secured by Bonds Rather Than Cash

The Federal Circuit also addressed the issue of whether the financial responsibility of Korean respondents for the payment of antidumping duties was capped by the amount of the bonds that they had posted during the period of investigation. Section 737(a) of the Tariff Act

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[3] A detailed examination of the record discloses that there was no longstanding administrative practice by the Department. Even if such a practice existed, however, it would not justify actions that are in conflict with the clear intent expressed in Section 772(d)(1)(C). *See, e.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (noting that "[e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

of 1930, as amended, expressly limits respondents' obligations to the amount of cash deposits made. The terms of the statute do not extend this cap to liabilities secured by bonds.

The Federal Circuit overruled the Court of International Trade and sided with the Department on this matter, holding that the Korean companies' final antidumping liability was limited to the amount of their estimated antidumping duties secured by bonds. In reaching this result, the Federal Circuit emphasized the need for great deference to the Department as the administering authority and its purportedly longstanding, contemporaneous interpretation of the statute. The Federal Circuit additionally stressed that section 737(a) does not explicitly prohibit the capping of antidumping liability when bonds have been posted, construing this "silence" as further support for its conclusion that the Department's reading is not unreasonable. Pet. App. 30.

The Department found ambiguity in the statute where none exists. A step one *Chevron* analysis would have disclosed that Congress spoke directly and unequivocally to the question of when final antidumping liability can be limited to the estimated antidumping liability. Section 737(a)'s plain words authorize a cap only when a cash deposit has been posted. Had Congress so intended, it would have extended the cap to bonds, as it did in section 707(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671f(a), with regard to countervailing duties.

Rather than adhere to "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written," *Estate of Cowart v. Nicklos Drilling Co.*,

112 S. Ct. 2589, 2594 (1992), the Federal Circuit resorted to an inappropriate and unreasonable analysis of legislative and regulatory history. In fact, the Department's contemporaneous reading of section 737(a) was faithful to the statute and capped antidumping liability only to "the amount of the estimated antidumping duty deposited." 45 Fed. Reg. 8182, 8204 (Feb. 6, 1980) (codified at 19 C.F.R. § 353.50 (1980)). The Department changed its position on the cap issue once in 1989, extending the benefits of the cap to obligations secured by bonds. It then changed its position a second time in 1992, limiting the cap to obligations secured by cash deposits.[4] The Federal Circuit seems to have gotten out of step with the Department's latest position on this issue, having deferred to the Department's 1989 policy after the Department had reversed that policy in 1992. The Federal Circuit should have decided this matter, as the Court of International Trade did,[5] on the basis of a straight-forward analysis under step one of *Chevron* rather than extending unfettered deference to the administrative agency.

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[4] The Department formally changed its regulations in 1989 to extend the cap to bonds as well as to cash deposits. 54 Fed. Reg. 12,742, 12,779 (Mar. 28, 1989) (codified at 19 C.F.R. § 353.23 (1989)). More recently, the Department reverted to its original interpretation limiting the cap to imports secured by cash deposits in keeping with section 737(a). *Antidumping Duties: Provisional Measures Deposit Cap*, 57 Fed. Reg. 45,769 (Oct. 5, 1992).

[5] Pet. App. 43-44 and case cited therein.

REASONS FOR GRANTING THE WRIT

1. The U.S. Court of Appeals for the Federal Circuit is a court of specialized jurisdiction. 28 U.S.C. § 1295 (1988). It provides the only appellate review available for antidumping and countervailing duty trade cases brought under Title VII of the Tariff Act of 1930. Decisions of the Federal Circuit in matters involving international trade law are, to some extent, shielded from review by this Court because there can never be a split with other circuits on substantive issues within the Court's area of specialized jurisdiction. When the Federal Circuit errs, however, its error endures, affecting all interested parties under the international trade laws.[6]

The decision of the Federal Circuit in this proceeding demonstrates a fundamental misconception by that Court regarding its responsibilities for providing meaningful judicial review of agency action. The Federal Circuit's failure to apply the *Chevron* test properly has consequences under the international trade laws that range far beyond the specific issues raised in this petition.

This Court has not reviewed a case arising under the international trade laws since before the Federal Circuit was created by the Federal Courts Improvement Act of 1982. Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered

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[6] Figures for 1992 place the dollar value of commodities covered by antidumping or countervailing duty orders at $6.7 billion. Dept. of the Treas., U.S. Customs Service, "Annual Report on the Status of the Antidumping/Countervailing Duty Program," Nov. 21, 1993. The Department of the Treasury, U.S. Customs Service estimates that imported merchandise covered by active antidumping and countervailing duty orders valued in excess of $9 billion was imported in 1993.

sections of 28 U.S.C.). The last international trade case to be given plenary review by this Court was *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978). The time has come for this Court to issue a writ of certiorari to review a decision of the Federal Circuit in a trade case.

2. The Federal Circuit failed to engage in a careful and probing inquiry into whether Congress has spoken directly to the issues at hand. This stands in stark contrast to the approach taken by other circuits having long-standing expertise in matters involving review of federal agency action.[7] The Federal Circuit effectively bypassed step one of the *Chevron* test by beginning its analysis with the unqualified statement that "[t]his question is one of statutory interpretation, which we must resolve with deference to the agency's interpretation rather than to the court's." Pet. App. 14. Rather than conduct a preliminary analysis of the statute to discern whether the intent of Congress was made clear in the language chosen, the Court referred to the ITA as the "master" of the anti-dumping law, Pet. App. 16, and stated that *Chevron's*

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[7] *See, e.g., American Dental Ass'n v. Shalala*, 3 F.3d 445, 446 (D.C. Cir. 1993) (explaining that under the two-step test of *Chevron* the court will "proceed to *Chevron*'s second step, and approve any reasonable agency construction of the statute, *only* if the statute is silent or ambiguous on the disputed point") (emphasis in original); *Oberstar v. Fed. Deposit Ins. Corp.*, 987 F.2d 494, 501 (8th Cir. 1993) (noting that the agency interpretation "does unacceptable violence to the plain language of the statute"); *Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 228 (9th Cir. 1992), *cert. denied, EPA v. Coalition for Clean Air*, 113 S.Ct. 1361 (1993) (recognizing a duty under *Chevron* to "exhaust the 'traditional tools of statutory construction' to determine if Congress has spoken to the precise question at issue").

"tenets extend to their limits when the ITA interprets antidumping law." *Id.* The Federal Circuit turned a blind eye toward the threshold question of whether Congress had spoken with sufficient clarity to determine whether it intended to limit the upward adjustment to United States Price when it amended the law in 1974.

It is particularly distressing to see a court of specialized jurisdiction – which by definition should itself possess specialized expertise – assume such a compliant position with respect to the agency over which it has been given exclusive jurisdiction. Moreover, the Federal Circuit's subservience to decisions of the Department on pure questions of statutory interpretation was not tempered in any way by the fact that the ITA's interpretation significantly reduced the margin of dumping, thereby diminishing the remedial effect that the antidumping law is intended to afford domestic industries and their workers. The legislative history of the 1921 Act and the various amendments to that Act over the years establish that the antidumping law is designed to offset injurious, unfair pricing by means of antidumping duties. Understated dumping margins and the capping of liability for the payment of antidumping duties secured by bonds do not provide the effective deterrent intended by Congress.[8]

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[8] The House Report which accompanied the Antidumping Act 1921 sets forth the purpose of imposing antidumping duties:

> The principle underlying the proposed additional duty to be added in prevention of dumping . . . [makes] it unprofitable to dump goods on the markets of the United States at lower prices. If the seller of the goods is compelled to add as duty the

3. Even if there were ambiguity in the statute, the ITA's interpretation would still not warrant deference here. The ITA has, on two previous occasions, publicly declared an interpretation of the commodity tax provision in direct contradiction to its current position. *Supra* at 7. The ITA freely admitted that Section 772(d)(1)(C) called for measurement of the tax, but declined to do so, saying that it was impossible to make such a measurement. Difficulty in administering a statute is not, however, sufficient reason for an agency to ignore the express intent of Congress. *United States v. H. Rosenthal Co.*, 609 F.2d 999, 1002 (CCPA 1979). Moreover, the proposition that the statute does not call for any measurement of foreign market taxes was offered for the first time on appeal by attorneys for the Department of Justice. This is precisely the sort of *post-hoc* litigation posture to which

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> difference between the sales price and what he would receive by selling in the otherwise highest obtainable market, all reward or inducement to dumping is removed.

H.R. Rep. No. 1, 67th Cong., 1st Sess. (to accompany H.R. 2435), at 23 (1921).

The Senate Report accompanying the 1958 amendments to the 1921 Act also emphasized the regulatory goals of the anti-dumping law to act as a deterrent to dumped sales:

> The antidumping feature of our Tariff Act [H.R. 6006] is of considerable importance in protecting domestic industries from inroads of foreign goods sold or offered for sale at less than fair value. Not only will the improvements made by this bill assist in speeding up the operating procedure, they will strengthen the deterrent effect of the law and in that respect help to prevent dumping.

S. Rep. No. 1619, 85th Cong., 2d Sess. (to accompany H.R. 6006), at 2 (1958).

this Court has refused to grant deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Similarly with its regulations governing the capping of antidumping liability, the Department has shifted its view over time. Initially in 1980 and since October 1992 the Department has correctly awarded this limitation only when estimated antidumping duties have been secured by cash deposits. The Justice Department's position on appeal is contrary to the currently stated policy of the Commerce Department and is entitled to no deference whatsoever. *Id.*

4. The Federal Circuit's failure to implement the *Chevron* doctrine properly has important implications well beyond its interpretation of Section 772(d)(1)(C) and Section 737(a). Review of agency action is at the very core of the Federal Circuit's appellate jurisdiction in trade cases. Excessive deference to agency determinations by the Federal Circuit deprives interested parties of effective judicial review in an area of jurisprudence of considerable importance. Failure to provide a careful and probing inquiry under step one of the *Chevron* analysis tilts the whole process of judicial review decisively in favor of the government, which needs only to assert a permissible interpretation in order to prevail under *Chevron*'s step two. The role of the judiciary in our system of checks and balances is to resolve tension between Congress which writes the laws and the Executive Branch which executes them. The *Chevron* doctrine is an important and delicate instrument in maintaining a proper balance. Certiorari should be granted to restore that critical balance in the implementation of our laws regulating international trade.

CONCLUSION

For the foregoing reasons the Writ should issue for review of the Federal Circuit's decision extending deference to the Department's interpretation of Sections 772(d)(1)(C) and 737(a) of the Tariff Act of 1930, as amended.

Respectfully submitted,

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Attorneys for Petitioners

Washington, D.C.
February 16, 1994

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-1558,-1559,-1560,-1561,-1562

DAEWOO ELECTRONICS CO., LTD. and
DAEWOO ELECTRONICS CORP. OF AMERICA, INC.

Plaintiffs-Appellants,

and

SAMSUNG ELECTRONICS CO., LTD. and
SAMSUNG ELECTRONICS AMERICA, INC.,

Plaintiffs-Appellants,

and

GOLDSTAR CO., LTD. and
GOLDSTAR ELECTRONICS INTERNATIONAL, INC.,

Plaintiffs-Appellants,

v.

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, TECHNICAL, SALARIED AND
MACHINE WORKERS, AFL-CIO, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS OF
AMERICA, INDEPENDENT RADIONIC WORKERS OF
AMERICA and INDUSTRIAL UNION DEPARTMENT,
AFL-CIO,

Plaintiffs-Appellants,

v.

ZENITH ELECTRONICS CORP.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 26, 1993.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

Dated: November 18, 1993

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: DAVID A. GANTZ, WARREN E. CONNELLY
FREDERICK L. IKENSON
MICHAEL P. HOUSE, VELTA A. MELNBRENCIS
PAUL D. CULLEN, BRUCE M. MITCHELL

DAEWOO ELECTRONICS CO V US, 92-1558
(CIT – 85-01-00140)

DAEWOO ELECTRONICS CO., LTD. and Daewoo Electronics Corp. of America, Inc., and Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc., and Goldstar Co., Ltd. and Goldstar Electronics International, Inc., Plaintiffs-Appellants,

v.

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO, International Brotherhood of Electrical Workers of America, Independent Radionic Workers of America and Industrial Union Department, AFL-CIO, Plaintiffs-Appellants,

v.

ZENITH ELECTRONICS CORP., Plaintiff-Appellee,

v.

The UNITED STATES, Defendant-Appellant.

Nos. 92-1558 to 92-1562.

United States Court of Appeals, Federal Circuit.

Sept. 30, 1993.

Rehearing and Suggestion for Rehearing in Banc Denied Nov. 18, 1993.

Korean television manufacturers appealed antidumping order. The Court of International Trade, 712 F.Supp. 931, remanded for reconsideration. The International Trade Administration (ITA) of Department of Commerce determined antidumping margins, and manufacturers appealed. The Court of International Trade, 760 F.Supp.

200, remanded for reconsideration. United States manufacturer moved for final judgment on Department's redetermination of antidumping margins. The Court of International Trade, Watson, Senior Judge, 794 F.Supp. 389, affirmed as modified. Parties appealed. The Court of Appeals for the Federal Circuit, Nies, Chief Judge, held that: (1) ITA reasonably interpreted antidumping statute in using accounting methodology to add all commodity taxes assessed on home market sales but forgiven upon export, and ITA was not required to make econometric analysis of tax incidence on home market consumers; (2) ITA's use of net delivered selling price to first unrelated customer as imputed commodity tax for calculating amount of tax adjustment was supported by substantial evidence; and (3) cap existed for antidumping duties irrespective of whether bond or cash deposit was posted as security.

Affirmed in part; reversed in part and remanded.

David A. Gantz, Reid & Priest, Washington, DC, argued, for plaintiffs-appellants, Daewoo Electronics Co., Ltd. and Daewoo Electronics Corp. of America, Inc. With him on the brief, were Elizabeth H. Lefebvre and Jennifer Karas.

Warren E. Connelly, Akin, Gump, Hauer & Feld, L.L.P., Washington, DC, argued for plaintiffs-appellants, Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. With him on the brief, was P. Bryan Christy, III.

Michael P. House, Donovan, Leisure, Rogovin & Schiller, Washington, DC, argued for plaintiffs-appellants, Goldstar Co., Ltd. and Goldstar Electronics International,

Inc. With him on the brief were R. Will Planert and John R. Brautigam.

Paul D. Cullen, Shannon, Rill & Scott, Washington, DC, argued, for plaintiffs-appellants, International Union of Electronic, Elec., Technical, Salaried and Machine Workers, AFL-CIO, Intern. Brotherhood of Elec. Workers of America, Independent Radionic Workers of America and Indus. Union Dept., AFL-CIO. With him on the brief, were Jeffrey S. Beckington, David C. Smith, Jr. and Stephen A. Jones.

John D. McInerney, Deputy Chief Counsel for Import Admin., argued, for defendant-appellant, the U.S. With him on the brief, was Robert E. Nielsen, Sr. Atty., Office of the Chief Counsel for Import Admin. Also on the brief, were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Velta A. Melnbrencis, Asst. Director, Commercial Litigation Branch, Dept. of Justice, Washington, DC.

Frederick L. Ikenson, Frederick L. Ikenson, P.C., Washington, DC, argued, for plaintiff-appellee, Zenith Electronics Corp. With him on the brief, was J. Erick Nissley.

Noel Hemmendinger and William J. Clinton, Wilkie Farr & Gallagher, Washington, DC, were on the brief, for Amicus Curiae, American Ass'n of Exporters and Importers.

Bruce Mark Mitchell and David L. Simon, Grunfeld, Desiderio, Lebowitz & Silverman, Washington, DC, were on the brief, for amicus curiae, Emerson Radio Corp.

Before NIES, Chief Judge, RICH, Circuit Judge, and SKELTON, Senior Circuit Judge.

NIES, Chief Judge.

These appeals challenge the antidumping duties imposed on color television receivers from Korea imported between October 19, 1983 and April 30, 1984. The decisions from the Court of International Trade to be reviewed are *Daewoo Electronics Co. v. United States*, 712 F.Supp. 931 (Ct. Int'l Trade 1989) (*"Daewoo I"*); *Daewoo Electronics Co. v. United States*, 760 F.Supp. 200 (Ct. Int'l Trade 1991) (*"Daewoo II"*); and *Daewoo Electronics Co. v. United States*, 794 F.Supp. 389 (Ct. Int'l Trade 1992) (*"Daewoo III"*). We affirm in part, reverse in part, vacate the judgment and remand for entry of a judgment in accordance with this decision.

I.

Background

Appellants Daewoo Electronics Co. Ltd., Samsung Electronics Co., Ltd., and Goldstar Co., Ltd. (collectively "the Korean companies"), are leading importers of color television receivers into the United States from Korea. Petitions by the International Union of Electronic, Electrical, Technical, Salaried, and Machine Workers, AFL-CIO, the International Brotherhood of Electrical Workers of America, and the Independent Radionic Workers of America and Industrial Union Department, AFL-CIO (collectively "the Unions") and by Zenith Electronics Corp., resulted in an antidumping investigation into the Korean television receivers imported between October 19, 1983 and April 30, 1984. On December 28, 1984, the

International Trade Administration of the Department of Commerce ("ITA") published the final determinations of its first administrative review, concluding that dumping margins of 14.88 percent, 12.23 percent and 7.47 percent existed on U.S. sales of Daewoo, Samsung, and Goldstar products respectively.[1] Color Television Receivers from Korea; Final Results of Administrative Review of Anti-dumping Duty Order, 49 Fed.Reg. 50420, 50431 (1984). As a result of rulings of the Court of International Trade in the successive appeals and remands, the dumping duties were revised upward to 48.18 percent, 30.36 percent, and 33.95 percent for Daewoo, Samsung, and Goldstar, respectively which the trial court approved.

The Korean companies, the Unions, and the United States have each appealed from the judgment of the Court of International Trade raising numerous issues. We address the propriety of the following holdings in the

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[1] Where, as here, goods identical to the imported goods are sold in the home market of the exporting country, a margin of dumping is determined by comparing the foreign market value ("FMV") to the United States price ("USP"). The absolute dumping margin for a sale is the amount, if any, by which FMV exceeds USP

Determinations of USP and FMV often entail involved calculations. USP is based upon the import's "purchase price," as defined by 19 U.S.C. § 1677a(b), or if the first sale to an unrelated American purchaser occurred in the United States, upon the "exporter's sales price," as provided in 19 U.S.C. § 1677a(c). FMV is based upon home market sales, third country sales, or constructed value. 19 U.S.C. § 1677b. Once these base figures are determined, Commerce further modifies them to account for shipping costs, differences in commercial quantities sold, or other factors pursuant to statutory provisions and its own regulations. *See, e.g.*, 19 U.S.C. §§ 1677a(d), 1677b(a)(1)(A).

Daewoo opinions: that 19 U.S.C. § 1677a(d)(1)(C) of the antidumping law requires that ITA make an econometric analysis of tax incidence in foreign markets (*Daewoo I*); that the ex factory price must be used for tax adjustments of the U.S. price (*Daewoo II*); and that under 19 U.S.C. § 1673f(a) a bond deposit may not cap the amount of liability for antidumping duties (*Daewoo III*). The identical issue of the multiplier effect of 19 U.S.C. § 1677a(d)(1)(C) raised in the Korean companies' appeal was rejected in the recently decided appeal. *Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1581, (Fed.Cir. 1993), which is controlling here. In addition, our disposition of the tax incidence issue moots two other issues: first, the Korean Companies' appeal from the holding of *Daewoo II*, 760 F.Supp. at 204-07, rejecting the ITA's finding of full tax pass-through in the Korean receiver market; and second, the Unions' challenge of the ITA's use of best information available pursuant to 19 U.S.C § 1677e(c) to adjust the USP. *Daewoo III*, 794 F.Supp. at 391-92.

II.

Adjustment for Taxes Levied on Home Country Sales Only

The antidumping statute, 19 U.S.C. § 1677a(d)(1)(C) (1988), recognizes that many countries assess excise or commodity taxes upon goods sold for domestic consumption, but forgive such taxes on export sales. To prevent the creation of dumping margins merely because the country of exportation taxes home market sales but not

exports,[2] the antidumping law provides an offsetting adjustment to the sales price of the goods in the United States (the "U.S. price" or "USP"). Section § 1677a(d)(1)(C) mandates that:

> The purchase price and the exporter's sales price shall be adjusted by being . . . increased by . . . the amount of the taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

In its original determination, the ITA interpreted section 1677a(d)(1)(C) as allowing the addition to the U.S. price of the full amount of the Korean taxes on television sets forgiven upon export. In this case the Korean taxing authority imposed a special excise tax, a defense tax and a value added tax that resulted in an aggregate commodity tax of 50.04 percent of the price of the television receivers. None of these taxes were assessed against the receivers exported to the United States. It is undisputed that the taxes had been added to Korean home market prices and had actually been paid by the Korean companies. The ITA concluded that these facts met the

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[2] As an example, assume that goods are sold for $100 in both the home market and the United States. While a tax of $50 is imposed in the home market, none is levied in the United States. If tax is not accounted for, a comparison of USP and FMV produces a dumping margin of $50.

requirements of section 1677a(d)(1)(C) for adding the full amount of the forgiven commodity taxes to the USP. In ITA's view, the statute permits what it terms an "accounting" method of determining that taxes were added to or included in the price of merchandise sold in the home country.

In the first appeal of this determination, *Daewoo I*, 712 F.Supp. at 931, the trial court rejected the ITA's allowance of the full amount of these Korean taxes.[3] The trial court held that the final clause of section 1677a(d)(1)(C), allowing augmentation of USP "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation," compelled the ITA to analyze the *consumer tax incidence* of the commodity taxes. Thus, instead of employing an accounting approach that allows USP to be increased by the full amount of a tax levied and paid on home market sales, the court reasoned that the ITA must undertake an econometric study of the Korean market to determine the tax incidence, or "pass through," of the

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[3] The standard of review is set forth in 19 U.S.C. § 1516a(b)(1)(B), which provides:

> The court shall hold unlawful any determination, finding, or conclusion found –
>
> (B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

28 U.S.C. § 2640(b) requires the Court of International Trade to apply this "substantial evidence" standard. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 932 n. 10 (Fed.Cir. 1984).

commodity taxes upon consumers.[4] According to the court, only that amount of the commodity tax that consumers actually bore in an economic sense should be added to USP. In so doing, the court relied on its earlier decision in *Zenith Electronics Corp. v. United States*, 633 F.Supp. 1382 (Ct. Int'l Trade 1986), *appeal dismissed as*

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[4] A leading introductory economics textbook describes a tax incidence analysis as asking the question:

> Who ultimately pays a particular tax? Does the burden stay on the person on whom it is first levied? One cannot assume that the people [a government] *says* a tax is levied on will end up paying that tax. They may be able to *shift* the tax: shift it "forward" on their customers by raising their price as much as the tax; or shift it "backward" on their suppliers (wage earners, rent and interest receivers) who end up being able to charge them less than they would have done had there been no tax.
>
> Economists therefore say: We must study the final *incidence* of the tax – the way its burden ultimately is borne, the totality of its effects on commodity prices, factor-prices, resource allocation, efforts, and composition of production and consumption. Tax incidence is no easy problem and requires all the advanced tools of economics to help toward its solution.

Paul A. Samuelson, *Economics* 164-65 (11th ed. 1980).

A simple example may illuminate this argument. Suppose a government imposes a sales tax of $50 upon previously untaxed merchandise sold for $100. Assuming away all other market intricacies, if the ultimate cost to the consumers becomes $150 following the tax, the tax incidence is 100%. The seller has passed through the entire amount of the tax to the purchaser.

If, however, the price of the merchandise rises to only $125 after the tax is imposed, the tax incidence is 50%. Here, the seller has passed through half the tax to the consumer, either absorbing or shifting backward the remaining $25.

moot, 875 F.2d 291 (Fed.Cir.1989). Unimpressed by the ITA's reasoning that its accounting methodology was a long-standing agency practice, that an econometric analysis would place an impractical and extremely onerous burden on the agency and importers in almost every investigation, and that such an approach is imprecise and would artificially inflate dumping margins,[5] the court remanded to the ITA holding that its methodology was not in accordance with the law.

On remand, the ITA commissioned Dr. Paul Wachtel, an economist affiliated with New York University, to undertake the mandated tax incidence analysis. Wachtel developed a complex oligopolistic[6] model of the Korean receiver market based upon the behavior of a single, representative firm. Although this approach did not distinguish individual firm traits, Wachtel determined that such a model would not suffer losses in accuracy due to

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[5] To the extent tax incidence is less than 100%, an economic or econometric analysis leads to a smaller upwards adjustment of USP than the accounting approach and therefore to greater dumping margins. To continue the previous example, support USP is $75. Further assume that a home market tax of $50, imposed on merchandise previously costing $100, resulted in a FMV of $125. If tax incidence is assumed to be 100%, USP is adjusted from $75 to $125, and no dumping margin exists. If tax incidence is instead considered to be 50%, then USP is adjusted upwards by only half the amount of the tax, from $75 to $100. Comparing a USP of $100 to a FMV of $125 results in a dumping margin of $25.

[6] An oligopoly is a "market condition in which sellers are so few that the actions of any one of them will materially affect price and hence have a measurable impact upon competitors." American Heritage Dictionary 866 (2d college ed. 1991). Here, the Korean receiver market was determined to be an oligopoly.

certain characteristics of the Korean receiver market. Based upon his analysis, Wachtel concluded that tax incidence in the Korean receiver market was 100 percent; i.e., that the consumer bore the entire amount of the Korean excise, defense and value-added taxes.

In a second appeal, *Daewoo II*, 760 F.Supp. at 200, the trial court rejected Dr. Wachtel's analysis, finding that the study did not adequately analyze Korean market data and that the aggregate approach did not reflect the reality of the marketplace. The court again remanded the case to the ITA. In this second remand, the ITA considered company-specific tax incidence measurements completed by Dr. Robert E. Litan of the Brookings Institute for the Korean companies and Dr. Michael D. Bradley of the George Washington University for Zenith. After rejecting the Litan study, the ITA adjusted USP based upon the Bradley study, which it characterized as the "best information available" pursuant to 19 U.S.C. § 1677e(c) (1988).[7] The agency ultimately found tax incidence varying from 33-63 percent, leading to dumping margins of 30.36 percent for Samsung, 33.95 percent for Goldstar,

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[7] Section 1677e(c) provides:

> Determinations to be made on best information available. In making their determinations under this title, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

See generally Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1559-62 (Fed.Cir. 1984).

and 48.18 percent for Daewoo. The trial court approved the ITA's analysis in *Daewoo III*, 794 F.Supp. at 389.

In this appeal, the United States and the Korean companies ask us to reverse the holding in *Daewoo I* and, in effect, the prior decision of the Court of International Trade in *Zenith Electronics*. They contend that the trial court erred in interpreting the statute to require the ITA to undertake an econometric measurement of tax incidence on home market consumers when adjusting USP to offset the forgiveness of consumption taxes upon exported merchandise.[8] In *Zenith Electronics*, 633 F.Supp. at 1398, the Court of International Trade had reached the "inescapable conclusion . . . that Congress intended the administering agency to perform tax absorption measurements for application in individual cases." While the ITA ultimately appealed the ruling, this court dismissed the appeal in *Zenith* because of the absence of a case or controversy. 875 F.2d at 293. The instant case now requires resolution of the issue of whether section 1677a(d)(1)(C) compels the ITA to undertake a tax incidence analysis.

This question is one of statutory interpretation, which we must resolve with deference to the agency's interpretation rather than to the court's. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 663 (Fed.Cir.1992). When considering the agency's construction of 19 U.S.C. § 1677a(d)(1)(C), we decide only whether "[the ITA's] interpretation of its statutory power

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[8] Amicus Curiae, American Association of Exporters and Importers, also submitted briefing on this issue, urging reversal of the Court of International Trade.

falls within the range of permissible construction." *Id.* at 667. The Supreme Court has instructed that

> a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The Court has further indicated that

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain [an agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978) (citations omitted).

These tenets extend to their limits when the ITA interprets the antidumping laws. As noted in *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571 (Fed.Cir.1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984) (citations omitted):

> The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate framework, for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of those factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and extremely delicate endeavor. [The ITA] has been entrusted with responsibility for implementing the antidumping law. [The ITA] has broad discretion in executing the law.

This court has recognized the ITA as the "master" of antidumping law, *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed.Cir.1985), worthy of considerable deference. *See also Suramerica*, 966 F.2d at 667.

The statutory language of 19 U.S.C. § 1677a(d)(1)(C) allows tax adjustment of USP "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation." The ITA and its predecessor have consistently interpreted this language since its enactment in 1974 as a requirement to examine customary business records of exporters. If an exporter's records show that a tax was either a separate "add on" to the domestic price or,

although not separately stated, was, in fact, included in the price and that the taxes were paid to the government, that satisfies the tax inquiry required by the statute for an adjustment of the USP. We conclude that this interpretation of the statute is reasonable. The statute does not speak to tax incidence, shifting burdens, or pass-through, nor does it contain any hint that an econometric analysis must be performed. The statutory language does not mandate that ITA look at the effect of the tax on consumers rather than on the Korean company. The reality is that, as an unavoidable incident of any sale by the company, these taxes can only be recouped in their entirety from purchasers.

Both Zenith and the Unions argue that such a reading of 19 U.S.C. § 1677a(d)(1)(C) renders its final phrase superfluous, but we disagree. As indicated, the language specifies adjustment whether or not the tax is separately stated in the home market price. Further, taxes of the type forgiven upon export may not actually be charged upon all home market sales. Exemption may be allowed under various taxation regimes. For example, the statutes describing the Korean defense tax, special excise tax, and value-added tax each include exemption provisions for certain transactions, such as international navigation services or sales to the military. Defense Tax Act, No. 2768, art. 3 (1975); Special Excise Tax Act, No. 2935, art. 2 (1976); Value-Added Tax Act, No. 2934, art. 11 (1976). *See also, e.g., Final Results of Antidumping Duty Administrative Review, Oil Country Tubular Goods from Canada*, 56 Fed. Reg. 38408, 38414 (1991) (noting that only certain home market sales incur "provincial tax"). The phrase is not rendered superfluous by ITA's interpretation.

In *Zenith Electronics*, the Court of International Trade found support for econometric studies in the history of the Trade Act of 1974, Pub.L. No. 93-618, 88 Stat.1978, 2045, the legislation that added the disputed language of section 1677a(d)(1)(C) to the statute.[9] The court quoted the following passage from H.R.Rep. No. 571, 93d Cong., 1st Sess. 69 (1973) (emphasis added):

> With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the *direct relationship of the tax to the product being exported*, or components thereof, could be demonstrated. Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. *To the extent that the exporter absorbs indirect taxes in his home market sales, no adjustments to purchase price will be made* and the likelihood or size of dumping margins will be increased.

633 F.Supp. at 1396. The court also set forth a portion of Ambassador William D. Eberle's statement to the Senate Finance Committee, *Hearings Before the Senate Committee on Finance on H.R. 10710*, 93d Cong., 2d Sess. 310 (1974):

> The definition of both "purchase price" and "exporter's purchase price" are amended to harmonize the treatment of foreign tax rebates

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[9] No party argues that a mandate for tax incidence analyses comes from any other source.

> under the Antidumping Act with the standard of their treatment under the countervailing duty law. No adjustment for tax rebates to the advantage of the foreign exporter will be permitted unless the *direct relationship between the tax and the exported product* or its components can be demonstrated. For example, if the exported product benefited from a tax rebate on the mortgage on the plant that produced it, the rebate could not be used in the computations to reduce the dumping margin. Moreover, an adjustment for a tax rebate will be permitted only to the extent such taxes are added to or included in the price of the merchandise when sold in the home market. *To the extent the exporter absorbs indirect taxes in sales in the home market, no adjustment will be made to purchase price.* The effect will be to increase the size of dumping margins under such circumstances.

633 F.Supp. at 1396-97. In the view of the trial court, these references constituted a "straight-forward explanation of the operation and purpose of the [disputed] clause" by Congress.[10] *Id.* at 1395.

We initially note that the thrust of these remarks expresses concern over identification of a particular tax with the specific product. Congress wished to limit any tax rebate to taxes with a *direct* relationship to the exported product. It is not at all clear what is meant by the later reference to "absorbs indirect taxes." But even if both of the quoted passages were intended to refer to tax incidence of directly related taxes, we cannot accept that

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[10] The court also cited other references that merely recited the words of the statute. *See* 633 F.Supp. at 1395-97.

these two passing references alone are sufficient to effect a revolutionary alteration of the ITA's and its predecessors' consistent use of an accounting approach. As the Supreme Court noted in *Allen v. State Bd. of Elections*, 393 U.S. 544, 568-69, 89 S.Ct. 817, 833, 22 L.Ed.2d 1 (1969), "in any case where the legislative hearings and debate are so voluminous, no single statement or excerpt of testimony can be conclusive." On this meager legislative history and with no real debate on what would have been a dramatic change in law, we cannot say that the ITA's interpretation of the statute contravenes the statute.

A consideration of subsequent legislative activity confirms this analysis. In *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1106 (Fed.Cir.1990), we stated that "additional deference may be given to an agency interpretation when a statutory provision remains unchanged after Congress has considered an amendment, particularly one that plainly would have reversed established agency practice on this issue." Although Congress both knew of the ITA's interpretation of the statute[11] and revisited the antidumping statute both in 1984 and 1988,[12] it took no action to modify the practice of the ITA.

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[11] *See Options to Improve the Trade Remedy Laws: Hearings Before the House Subcommittee on Trade, Committee on Ways and Means*, 98th Cong., 1st Sess. 619, 624 (1983) (statement of Terrence P. Stewart informing Congress that Commerce does not require proof of tax "pass through" when adjusting USP for domestic taxes).

[12] Omnibus Trade and Competitiveness Act, Pub.L. No. 100-418, 102 Stat. 1107 (1988); Trade and Tariff Act of 1984, Pub.L. No. 98-573, 98 Stat. 2948.

In reaching this result, we are also cognizant of the onerous burden entailed by the Court of International Trade's mandate. In contrast to the commercial facts available in sales receipts, tax returns and other accounting records, an econometric analysis of tax pass-through requires numerous subsidiary market inquiries, entails a high degree of speculation based on one economic theory rather than another, and produces results of dubious soundness. As the Supreme Court noted in *Zenith Radio*, 437 U.S. at 458-59, 98 S.Ct. at 2449 (citation omitted), a countervailing duty case:

> Even "modern" economists do not agree on the ultimate economic effect of remitting indirect taxes, and – given the present state of economic knowledge – it may be difficult, if not impossible, to measure the precise effect in any particular case. . . . In this situation, it is not the task of the judiciary to substitute its views as to fairness and economic effect for those of [the ITA].

Similarly, when this court considered the ITA regulations that modified foreign market value based upon *cost* differences in circumstances of sales, rather than on "value", we recognized that "[t]he ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of [the ITA's] decision to rely on cost. Cost may be the only *practical* way to administer the statute." *Smith-Coroma*, 713 F.2d at 1577 n. 27. An economic analysis of tax incidence may reasonably be rejected for the same reason. The delay and expense in making such an analysis in virtually every investigation would restrict the number of investigations which could be handled and interfere with

ITA's statutorily mandated duty to "complete the [antidumping] determination within rigid time limits." *Id.* at 1577. Nor would this approach enable exporters to the United States to operate within the confines of the antidumping laws; antidumping duty assessments could issue based upon econometric measurements the exporter could not possibly predict. Further, we cannot conclude that the burden is worth undertaking because of more soundly based results. The results of econometric analysis of tax pass-through in this case resulted in three widely disparate opinions.

We thus cannot agree with the trial court that the ITA's interpretation of section 1677a(d)(1)(C) was contrary to the statute. We reverse this holding of *Daewoo I*, 712 F.Supp. at 954-56.

III.

Tax Basis

The Korean companies additionally allege error by the Court of International Trade in reversing the ITA's use of the net delivered selling price to the first unrelated customer as the imputed commodity tax base under 19 U.S.C. § 1677a(d)(1)(C) for calculating the amount of tax adjustment. That provision mandates a calculation of imputed tax amounts to be added to the USP, but does not specify to which USP the Korean taxes are to be applied as the product moves to the consumer. This determination is important because the Korean taxes are not a specific amount, but instead ad valorem in nature; and it is difficult because the question is a hypothetical. The Korean taxes must be applied to sales of goods at

some discrete moment in the stream of commerce with or in the United States, a different market from that in which the taxes should be levied, but are not, because of exportation.[13]

By analyzing Korean tax law and practice, the ITA sought to make an informed judgment on how the Korean authorities would theoretically tax the exported television receivers so as to select the most comparable price in the U.S. market. Upon the first remand, the ITA determined that in Korea, the taxes were assessed against the net price of the delivered television receivers to unrelated dealers. The Korean price paid by the dealer included post-factory costs, such as delivery and warehousing and the tax was assessed on the price including these post-factory costs. The ITA reasoned that the Korean dealers had the distinguishing trait of being the first parties in the Korean stream of commerce *unrelated* to the manufacturer. Accordingly, in selecting the U.S. prices, the ITA

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[13] An example may demonstrate the significance of this determination. Assume that certain goods sell for $200 in both the United States and in the seller's home market, and that the foreign market tax rate is 50%. In the United States, the goods are sold from the factory to a related distributor for $100. The distributor then sells the goods to consumers for $200. In the foreign market, the goods are sold directly to consumers for $200, plus a tax of $100, for a total of $300.

If the tax base is considered to be the sales price to the first unrelated customer, then FMV, including taxes, equals $300. Commerce would also modify the base USP of $200 upwards by 50%, to equal $300. No dumping margin exists.

If, however, the tax base is considered to be the factory sales price, Commerce would only modify a base USP of $100 to $150. As the FMV remains $300, a dumping margin of $150 results.

passed over the intracompany transfer price to affiliates of the Korean manufacturer which brought the receivers to the U.S., i.e., an ex factory price. Instead the ITA selected as most comparable the sales price to customers who were the first unrelated purchasers in the chain. The USP from the importer to U.S. dealers thus also included transportation, storage and selling expenses.

On appeal, *Daewoo II*, 760 F.Supp. at 202-04, the Court of International Trade rejected the ITA's selected tax base. According to the court, the "plain mandate of Korean law" indicated "that the tax base in the home market is the price at which the goods are carried out of the place of manufacture." *Id.* at 203. The court considered the statutory language to compel use of an ex factory price, which does not include any post-factory expenses, as the tax base. In the view of the trial court, the ITA acted without the support of substantial evidence in the record that the sales price to the first unrelated purchaser in the United States would likely be the tax base chosen by Korean authorities. The court did note, however, that "in the Korean market the taxable events were sales to unrelated dealers, but that just happened to be the type of price at which the ex factory transaction occurred." *Id.* at 204.

On review of this issue, like the trial court, we look to see whether substantial evidence supports the decision of the ITA on this issue. Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita*, 750 F.2d at 932 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)).

The specific determination we make is "whether the evidence and reasonable inferences from the record support the [ITA] finding." *Matsushita*, 750 F.2d at 933. The question is whether the record adequately supports the decision of the ITA, not whether some other inference could reasonably have been drawn. As frequently stated, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966)).

It cannot be determined from review of the three Korean tax statutes alone what would be the tax base in Korea. The legislation is broadly worded and does not specify whether, for instance, delivery and insurance costs are included. The Value-Added Tax Act, No. 2934, art. 6 (1976) provides only that a taxable transaction consists of "the delivery and/or transfer of goods." The "taxable basis" consists of monetary payments for those goods; although such items as damaged goods are excluded from the basis, the statute does not address delivery costs. *Id.* at art. 13.

The Special Excise Tax Act, the statute apparently relied upon by the Court of International Trade, *see Daewoo II*, 760 F.Supp. at 203, is at first blush more helpful.[14] It provides that the appropriate tax base for manufacturers consists of "the price at which the goods are carried out from the factory." Special Excise Tax Act, No.

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[14] As the defense tax is a surtax on the special excise tax, it presents no relevant basis provisions and is unhelpful. *See* Defense Tax Act, No. 2768, art. 4, item 5 (1975).

2935, art. 8 (1976). Although the translated statutory language suggests that we would call an ex factory price, i.e., without delivery and other post-factory charges, it could also be that the price contemplated by the statute includes an add-on for the "carrying out from the factory."

In reaching its conclusion of the USP, the ITA relied on actual Korean tax practice, not merely on the statutes. As part of the ITA investigation, the Korean companies submitted numerous accounting records providing information on receiver sales and taxation. These records spanned tens of thousands of sales over the period under review. It is uncontested that these records demonstrate that in each case, the tax base employed by the Korean authorities consisted of the full delivered sales price to dealers. The tax base actually employed by the Korean authorities therefore included delivery, warehousing and other post-factory costs. In addition, the Korean companies point to evidence demonstrating that, when the manufacturer sold receivers to its affiliate rather than directly to an unrelated dealer, Korean tax officials used the dealer price as the tax base and ignored the intra-company transfer price.

Given this evidence, we cannot agree with the trial court that the ITA erred in selecting the analogous point for the tax base in the United States. Substantial evidence supports the ITA's choice, and that is all the statute requires. The Court of International Trade's rejection of the USP selected by the ITA for lack of substantial evidence is reversed.

IV.

Cap on Duties

The Korean companies also appeal the Court of International Trade's holding in *Daewoo III*, 794 F.Supp. at 393, that no cap on assessment rates exists if estimated duties are deposited in the form of a bond.[15] This ruling concerns an ITA regulation, 19 C.F.R. § 353.50, which specifically treated cash deposits and bond deposits the same for capping purposes.[16]

Under the antidumping laws, estimated duties may be assessed and must be paid or guaranteed before the amount is finally resolved. If a preliminary determination

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[15] Amici curiae Emerson Radio Corporation and the American Association of Exporters and Importers filed briefs on this issue.

[16] 45 Fed. Reg. 8182, 8204 (1980) (codified at 19 C.F.R. § 353.50) provided that:

> If the amount of the estimated antidumping duty deposited pursuant to the Preliminary Affirmative Determination is different from the . . . Antidumping Duty Order, the difference . . . shall be:
>
> (a) Disregarded, to the extent that the estimated duty is less than the duty determined to be assessable under the Order, or
>
> (b) Refunded, to the extent that estimated duties collected were more than the duty determined to be assessable under the Order.

Commerce later clarified the provisional rate cap regulation:

> If the cash deposit or bond . . . is different from the dumping margin . . . , the Secretary will instruct the Customs Service to disregard the difference to the extent that the cash deposit or bond is less than the dumping margin. . . .

54 Fed. Reg. 12742, 12779 (1989) (codified at 19 C.F.R. § 353.23).

indicates that dumping has occurred, 19 U.S.C. § 1673b(d) requires the ITA to "order the posting of a cash deposit, bond, or other security, as it deems appropriate, for each entry of the merchandise concerned equal to the estimated average amount by which the [FMV] exceeds the [USP]."

If a preliminary determination matures into a final affirmative determination of dumping and issuance of a dumping order which exceeds the cash or bond deposit, the ITA by regulation limited an importer's antidumping duty liability to the amount of the previously deposited, estimated duties whether the deposit was in the form of cash or bond. In issuing this regulation, the ITA relied on the statute respecting the cap although the statute does not specifically deal with capping by a bond deposit. The pertinent statute, 19 U.S.C. § 1673f(a) (1988), provides:

> If the amount of a cash deposit collected as security for an estimated antidumping duty . . . is different . . . from the antidumping order, . . . then the difference shall be –
>
> (1) disregarded, to the extent the cash deposit collected is lower than the duty under the order, or
>
> (2) refunded, to the extent the cash deposit is higher than the duty under the order.

The Korean companies here covered their estimated duty obligations with bonds in accordance with the statute and regulations.

In determining that bond deposits did not suffice to cap antidumping duty liability, the *Daewoo III* court relied upon a ruling in *Zenith Electronics v. United States*, 770 F.Supp. 648 (Ct. Int'l Trade 1991) ("*Zenith II*"). There, the

court rejected the ITA's interpretation that a bond deposit had the same effect as a cash deposit. The ITA had argued that section 1673f(a), in referring only to *cash* deposits, contrasted with other related sections which refer also to bonds and other forms of security, *see* 19 U.S.C. §§ 1673b(d)(2), 1673d(c)(2)(B), 1673e(c)(1), and believed that the difference was an inadvertence which would have awkward results. However, the court disagreed, noting that section 1673f(a) appeared to single out cash deposits, and that a cap on assessment rates for deposits in the form of bonds or other security was contrary to the statute. *Zenith II*, 770 F.Supp. at 651-54. Applying this rule, the *Daewoo III* court, held that the Korean companies were liable for the amount of the dumping margin determined in the final antidumping order – an amount significantly greater than the estimated duties for which they posted a bond. 794 F.Supp. at 393.[17]

In considering the issue, we continue to rely upon the case law previously cited in Part II of this opinion respecting deference to the ITA's interpretation. We have additionally examined the authority of *Melamine Chemicals, Inc. v. United States*, 732 F.2d 24 (Fed.Cir.1984), where this court also considered an antidumping regulation promulgated by the ITA. We there observed:

> When the issue is the validity of a regulation issued under a statute that an agency is charged

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[17] After the Court of International Trade issued its opinion in *Zenith II*, Commerce indicated that it would follow that holding, but prospectively only. 57 Fed. Reg. 45769 (1992). The court here rejected that limitation. In view of our resolution of this issue, the changed regulation may have prospective application only.

> with administering, it is well established that the agency's construction is entitled to great weight. Similarly, agency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute, and are to be held valid unless weighty reasons require otherwise.

Id. at 928 (citations omitted). We are also mindful of the ITA's past practice in this area. The Trade Agreements Act of 1979, Pub.L. No. 96-39, § 107, 93 Stat. 144, 193, provided that its provisions, including 19 U.S.C. § 1673f(a), would take effect on January 1, 1980. The ITA issued 19 C.F.R. § 353.50 the next month, on February 6, 1980, interpreting the statute to allow the cap for bond and cash deposits. 45 Fed. Reg. 8182, 8204. In this regard, the Supreme Court has instructed that "an administrative practice has particular weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978) (citations omitted). We further note that the ITA has consistently placed a ceiling upon antidumping duties irrespective of whether a bond or cash deposit is posted as security.

With these standards guiding us, we again must hold that the Court of International Trade erred by substituting its interpretation for that of the ITA. Section 1673f(a) does not prohibit the application of the cap to bonds. This provision simply does not speak to whether estimated duty bonds cap antidumping duties. Given this silence, as well as the statute's authorization to *file* bonds to cover

estimated duties, we cannot say that the ITA's allowance of a duty ceiling for bonds is contrary to the statute. We also are unpersuaded of any other "weighty reasons" to hold that the ITA's longstanding practice rests on an unreasonable interpretation of the statute.[18]

An examination of the antidumping statute's legislative history buttresses our conclusion. The House Committee Report to the 1979 Trade Agreements Act includes the following passage:

> [T]he Committee understands that it is the intent of the Authority to require cash deposits only in those cases where it believes that bonds or other forms of security will not adequately protect the revenue. Because injurious dumping has not been finally determined at this point in the investigation and a requirement of a cash deposit, if unnecessary, might represent a burden to the importer, the Committee has agreed with this practice.

H.R.Rep. No. 31, 96th Cong., 1st Sess. 62 (1979). Further, this court has recognized that "failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Chaparral Steel*, 901 F.2d at 1106 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)).

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[18] Considered alone, the failure to specify bonds in § 1673f(a) might indicate a deliberate decision by Congress against a cap based on a bond or security. *Cf. Nissan Motor Corp. v. United States*, 884 F.2d 1375, 1377 (Fed.Cir.1989) (reciting the familiar maxim that *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of the alternative). However, such a conclusion is not the only possible inference here in view of the other factors discussed above.

Although Congress has twice significantly amended the Act, it did not alter section 1673f(a) on either occasion.[19] Both of these actions evidence that the policy of the ITA comports with congressional intent.

In reaching its conclusion, the Court of International Trade relied principally on a "clear distinction [between treatment of cash and bonds] in the underlying international agreements" that the U.S. international trade laws were designed to implement. *Zenith Electronics*, 770 F.Supp. at 653. The court concluded that while the GATT Subsidies Code provided for a cap whether the security took the form of cash or bond, the GATT Antidumping Code distinguished a security from cash and only a cash deposit capped the duties. We do not find such differences between the GATT Antidumping and Subsidies Codes. The court quoted from a House of Representatives reprint of the GATT Antidumping Code[20] which stated that provisional measures "may take the form of a provisional duty or, preferably, a security – *by deposit or bond* – equal to the amount of the anti-dumping duty provisionally estimated." *Id.* (emphasis added). From this language, the court then reasoned, "[t]his establishes a distinction in the Antidumping Code between 'provisional duty,' which would be the equivalent of cash deposits under the law, and the posting of securities." *Id.*

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[19] *See supra* note 12.

[20] *Agreements Reached in the Tokyo Round of Multilateral Trade Negotiations*, H.R.Doc. No. 153, 96th Cong., 1st Sess., pt. 1, at 312, 323 (1979).

Our examination of the GATT Antidumping Code reveals that the distinction drawn by the Court of International Trade was based on an incorrect print.[21] The correct version of the GATT Antidumping Code reads: "[p]rovisional measures may take the form of a provisional duty, or, preferably, a security – by *cash* deposit or bond – equal to the amount of the antidumping duty provisionally estimated."[22] The addition of the word "cash" negates the court's interpretation that a security could not be a cash deposit.

We conclude that the Court of International Trade erred in invalidating the ITA's regulation on the ground of conflict with section 1673f(a). The holding of *Daewoo III*, 794 F.Supp. at 393, that bond deposits do not cap antidumping duties is reversed.

V.

Conclusion

For the foregoing reasons, we affirm the decision of the Court of International Trade on the issue of multiplier effect of 19 U.S.C. § 1677a(d)(1)(C), and reverse its rulings on the other issues addressed herein. The case is remanded for proceedings consistent with this opinion.

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[21] The House Report cited by the court includes this language in its "Corrigendum" section, which instructs the reader to "[i]nsert 'cash' between 'by' and 'deposit' in the second line" of paragraph 2 of Article 10. H.R.Doc. No. 153, *supra*, at 333,335.

[22] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, supra*, Part I, art. 10, para. 2, 31 U.S.T. at 4933 (emphasis added).

VI.

Costs

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED.

DAEWOO ELECTRONICS CO., LTD. et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

Court No. 85-01-00140.

United States Court of International Trade.

July 14, 1992.

Korean television manufacturers appealed antidumping order. The Court of International Trade, 712 F.Supp. 931, remanded for reconsideration. The Department of Commerce determined antidumping margins, and manufacturers appealed. The Court of International Trade, 760 F.Supp. 200, remanded for reconsideration. United States manufacturer moved for final judgment on Department's redetermination of antidumping margins. The Court of International Trade, Watson, Senior Judge, held that: (1) Department properly ordered Korean manufacturers to use econometric methods; (2) Department properly relied on report of United States manufacturer's expert as best information available; (3) Department used correct tax basis for exported television receivers; and (4) earlier decision with respect to assessment rate cap had to be modified to conform with subsequent decision in another case.

Affirmed as modified.

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Collier, Shannon, Rill & Scott, Washington, D.C. (Paul D. Cullen and Jeffrey S. Beckington of counsel) for defendant-intervenors the International Union of Electronic, Elec., Technical, Salaried and Machine Workers, AFL-CIO; Internl. Broth. of Elec. Workers; Independent Radionic Workers of America, and Indus. Union Dept., AFL-CIO.

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OPINION AND ORDER

WATSON, Senior Judge:

Following a second remand to the Department of Commerce and its redetermination, this action is now before the court on a motion by Zenith Electronics Corporation for final judgment. The motion is supported by the

government and opposed by three groups of Korean litigants, Daewoo, Samsung, and Goldstar. The previous opinions in this case were *Daewoo Electronics Co., Ltd. v. United States*, 13 C.I.T. 253, 712 F.Supp. 931 (1989) and *Daewoo Electronics Co., Ltd. v. United States*, ___ C.I.T. ___, 760 F.Supp. 200 (1991).

The central issue in this motion for final judgment concerns the tax pass-through measurement for which the court set out guidelines in its second remand.

The tax pass-through measurement which remains at issue here is done for the purpose of determining to what extent the foreign market price is higher than the price in the United States due to the fact that it includes a tax imposed when the merchandise is sold in the country of exportation, but *not* imposed when it is exported. In order to eliminate the unfairness which would result from comparing a price which includes the tax to one which does not, and thus finding a dumping margin where one does not exist, the law requires an adjustment for taxes. Obviously, the greater the percentage of the commodity tax which is passed on to the consumer and which shows up in the price, the larger is the effect resulting from its removal from the equation comparing the price in the home market of the foreign producer and the price in the United States market.

In the remand opinion, the court disapproved the method by which Commerce found that the entire commodity tax was passed through to consumers. In brief, Commerce made certain assumptions about the nature of the demand curve for the products in the Korean market which were not tested against actual data. Commerce also

aggregated the data of all Korean respondents for different types of television receivers, creating a database which did not accurately reflect the evidence in the record. Accordingly, the court remanded the action to Commerce "to perform the analysis on a disaggregated basis, to consider alternative forms for demand curves, and explain the evidence from the data which justifies it [sic] choice of one form over others." At the conclusion of its opinion, the court ordered "that with respect to the measurement of tax pass-through, Commerce shall perform the measurements on a disaggregated basis for each respondent and for the different types of television receivers; and that Commerce shall consider alternative forms of demand curves and specify the evidence in the record which makes it [sic] chosen curve a superior representation of the facts with respect to demand in the home market."

The Korean litigants argue that the results of this latest remand proceeding are defective because Commerce did not comply with the full terms of the court's order. They further argue that Commerce did not specify the methodology which was to be used in measuring the pass-through when it placed a burden on the Korean litigants to use generally accepted econometric methods to calculate the pass-through. The Korean interests also claim that Commerce ultimately erred in using Professor Bradley's measure of pass-through (which had earlier been submitted by Zenith), as the best information available.

As to the first argument, the court is satisfied that Commerce complied with its obligations under the

remand order by requiring the respondents to use generally accepted econometric methods. The failure of respondents to supply the information on which a more precise analysis could have been made, cannot be held against Commerce.

The court views econometrics as one of a number of alternative methodologies. Although it would obviously be easier for the respondents if Commerce specified the particular econometric technique which should be used, that is not a requirement of the court, nor would it be reasonable in the formative stages of administrative experience in this area.

The claim that Commerce improperly relied on the best information available and unlawfully rejected the information supplied by the Korean respondents requires some background discussion. Commerce began its reconsideration on remand by requiring the respondents to provide pass-through measurements, utilizing any methodology which they wished to employ, and opened up the record for the receipt of new information. Zenith objected to the opening of the record. Thereafter, the government moved the court for an extension of time within which to complete the remand, asking for nine months if the record was to be reopened or four months if it was to remain closed. The court approved the second alternative. In the meantime, Commerce had corrected its first remand instructions by informing the respondents that in order to perform the tax pass-through measurement, they had to use generally accepted econometric methods and were not free to use any methodology at all. The three Korean respondents submitted individual pass-through analyses, all of which relied exclusively upon a

report which had been prepared for them by their jointly retained consultant, Dr. Litan. With respect to the basic question of what demand curve functional form would best fit the underlying data in this case (linear, log-linear, or quadratic), the Litan report gave overwhelming support for the log-linear specification. That conclusion was based on the fact that Dr. Litan calculated certain statistics for several types of regressions run against each of the three functional forms in issue. According to Dr. Litan, the log-linear form, which is the one which conclusively dictates full pass-through in this case, produced the best results for 11 of the 12 models/producer combinations. Based on that conclusion, it was unnecessary for Dr. Litan to perform actual pass-through measurements and none were made.

Following the submission of the Litan Report, Zenith submitted comments by Professor Bradley which conclusively showed that Dr. Litan had erred in applying the formula for developing the statistics for the log-linear equation. A correct computation of those statistics actually provided corroboration that tax pass-through was less than 100%.

Thereafter, the Korean respondents submitted a corrected report from Dr. Litan. That correction was followed by another response from Professor Bradley. Commerce ultimately rejected the corrected Litan report on the ground that his chosen method was not adequately implemented. More specifically, Commerce noted that the Litan report should have employed a maximum likelihood test, a test that it considered necessary to implement the procedure finally being used by Dr. Litan to distinguish between functional forms.

The rejection of the Litan report, after a relatively generous allowance of an opportunity for its correction, left the record bare of any pass-through measurements other than those of Professor Bradley. At that point Commerce chose to invoke its authority to use the best information available to designate Professor Bradley's measurement as such information without relying directly upon Professor Bradley's underlying analysis as the one preferred by Commerce.

The Korean litigants argue that having rejected Dr. Litan's work, Commerce should have relied on the work of its own economists rather than moving to the measurements of Professor Bradley.

The court is of the opinion that the work done by Commerce's own economists does not amount to a measurement of pass-through, does not cure the defects found in the Litan report on which it is based, and would be insufficient to support a choice between linear and log-linear demand equations. The only conceivable support for using the work of Commerce's own economists is Table One of Technical Appendix Two to the second remand results. This shows only the outcome of a single manipulation of Dr. Litan's result and does not represent the outcome of a new set of estimations. The economists themselves indicate that their table does not provide any statistical tests which would allow one to choose between linear and log-linear demand equations. Second R.R. Public Doc. No. 71, Technical Appendix Two at 14.

What remains is the question of the legality of Commerce's use of Professor Bradley's results as the best information available. The court does not find this to be

an improper use of the authority to rely on best information available. There can certainly come a point in an administrative proceeding when providing further opportunities for respondents to supply information has to be balanced with the need to reach a final result. The court does not find it necessary to discuss the flaws which Commerce itself professes to find in the Bradley measurement result. Even if the Bradley measurement results are flawed, this would not detract from their use as best information available.

The court notes that the use of best information available by the Commerce Department in its final results in this second remand led to a conclusion that from thirty-three percent to sixty-two percent of the Korean commodity taxes were passed-through by the Korean respondents and could therefore enter into the calculation of the dumping margin. It should be pointed out that this was not the harshest result which the agency could have reached. It would have been entirely within the power of the Commerce Department, in the absence of satisfactory information concerning the claimed commodity tax adjustment, to deny that claim in its entirety. In point of fact, the Unions argue that in the absence of a proper showing of entitlement by the Korean respondents to the claimed adjustment, no adjustment whatsoever should have been made. The unions argue that Commerce violated a fundamental tenet of administrative law by departing from the standard practice of requiring a demonstration of entitlement before granting an adjustment. The court does not find that such a rigorous standard applies in this area of the law. The Commerce Department has the authority to make adjustments to the extent

warranted by the evidence in the record and they need not be made on an all or nothing basis.

Aside from the argument about the pass-through measurements, the Korean litigants argued that Commerce erred by not including U.S. resale profit in the tax basis of exported receivers. Goldstar also argues that Commerce erred by removing international movement costs from the tax basis of exported receivers.

The court finds that Commerce's use of the price for exportation as the tax basis for all exported receivers was correct. This conforms to the court's previously expressed opinion in this case that there is no evidence in the record to contradict the conclusion based on Korean law that the price for exportation at which the merchandise left the place of manufacture would have been the tax base if a tax was to be imposed on exportations. The price for exportation clearly does not include U.S. resale profit nor does it include the cost of international movement and U.S. importation, which are incurred after exportation. For this reason, the court approves the tax basis used for exported receivers in the second remand.

In its motion for final judgment, Zenith also asks this court to reverse its earlier decision in this case, which goes back three years, that a cap existed on the duty assessment rate which ultimately would be applied to "dumped" entries if estimated antidumping duties were deposited in the form of a bond. Zenith is correct in pointing out that a conflict exists between that opinion and the court's more recent decision in July of 1991 on that same issue. The later decision fully and clearly sets out the court's current opinion that there is no cap on

assessment rates if estimated duties are deposited in the form of a bond. In the interest of justice and in the interest of having this opinion accurately reflect the state of the law as it presently exists, the earlier decision in this case must be modified to conform to the decision in Slip Op. 91-66.

For the reasons given above, it is hereby ORDERED, ADJUDGED and DECREED that the second determination of the Department of Commerce on remand in this action, which is dated September 24, 1991, is upheld, and it is further

ORDERED, ADJUDGED and DECREED that no assessment rate cap may be applied in liquidating the subject entries unless the importer paid a cash deposit for an estimated antidumping duty. This is in accordance with the court's decision and holding on July 29, 1991 (Slip Op. 91-66) in *Zenith Electronic Corporation v. United States, Et. Al*, Court No. 87-01-00039, 770 F.Supp. 648, and it is further

ORDERED, ADJUDGED and DECREED that to the extent that the court's earlier decision herein on April 1989 (Slip Op. 89-42), 712 F.Supp. 931, on the subject of the assessment rate cap is inconsistent with the court's more recent decision on July 29, 1991 (Slip Op. 91-66) the decision in Slip Op. 89-42 is modified to conform to the decision in Slip Op. 91-66.

DAEWOO ELECTRONICS COMPANY, LTD., et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

Court No. 85-01-00140.

United States Court of International Trade.

March 25, 1991.

Korean television manufacturers appealed from Department of Commerce's antidumping order. The Court of International Trade, 712 F.Supp. 931, remanded for reconsideration. On remand, the Department of Commerce again determined dumping margins, and appeal was taken. The Court of International Trade, Watson, Senior Judge, held that: (1) in determining foreign taxes forgiven for purposes of calculating dumping margins substantial evidence did not support Commerce Department's determination that taxes forgiven on exportation of merchandise would have been taxes based on first sale to unrelated purchaser in the United States market; (2) in Department's econometric model used to determine whether Korean commodity tax was passed through to consumers in Korea was not supported by substantial evidence; and (3) Department's errors in calculations in determining dumping margins were required to be corrected on remand.

Remanded.

Oppenheimer Wolff & Donnelly (David A. Gantz and Timothy A. Harr, of counsel), Washington, D.C., for

plaintiffs Daewoo Electronics Co., Ltd., Daewoo Electronics Corp. of America, Inc. and Daewoo Corp.

Dow, Lohnes & Albertson (William Silverman, Michael P. House and R. Will Planert, of counsel), Washington, D.C., for plaintiffs Goldstar Co., Ltd. and Goldstar Electronics Intern., Inc.

Arnold & Porter (Sukhan Kim, Lawrence A. Schneider and Susan G. Lee, of counsel), Washington, D.C., for plaintiffs Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley and Larry Hampel, of counsel), Washington, D.C., for plaintiff Zenith Electronics Corp.

Collier, Shannon & Scott (Paul D. Cullen and Jeffrey S. Beckington, of counsel), Washington, D.C., for plaintiffs Intern. Union of Electronic, Elec., Technical, Salaried and Mach. Workers, AFL-CIO, Intern. Broth. of Elec. Workers, Independent Radionic Workers of America and Industrial Union Dept., AFL-CIO.

Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director, Commercial Litigation Branch, Civil Div., U.S. Dept. of Justice, Velta A. Melnbrencis, atty., New York City, Robert E. Nielsen, atty., Office of the Chief Counsel for Import Admin., U.S. Dept. of Commerce, Washington, D.C., for defendant.

WATSON, Senior Judge:

This consolidated action is before the court for review of the results of a redetermination made by the Department of Commerce ("Commerce") pursuant to this court's remand in *Daewoo Electronics Co., Ltd. v. United*

States, 13 CIT ___, 712 F.Supp. 931 (CIT 1989). It relates to the question of dumping margins which were determined for color television receivers from Korea.

The court turns first to the question of whether or not Commerce complied with the adjustment for taxes required by § 772(d)(1)(C) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677a(d)(1)(C)). That provision is among those designed to insure that before a comparison is made between the price in the home market of the foreign producer and the price for the U.S. market, the "United States price", (further categorized as "purchase price" or "exporter's sales price") does not come out lower than the home market price of the foreign producer simply because it does not include certain unavoidable amounts which are included in the price of the merchandise when it is sold in the foreign country. In particular, the provision involved here is concerned with the extent to which the foreign market price may be higher due to the fact that it includes a tax imposed when the merchandise is sold in the country of exportation but not imposed when it is exported. To eliminate that possible imbalance or unfairness in the comparison the law provides that the U.S. price should be increased by –

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

The Korean taxing authority imposes three taxes on such merchandise when it is not exported. They are, a special excise tax of 28%, a defense tax of 30% of the special excise tax amount, and a value added tax of 10% levied on the sum of the tax base, the special excise tax amount and the defense tax amount.

Commerce ultimately determined that the actual Korean tax base was the net dealer delivered price, that is to say, the price to the first unrelated home and market buyer. It therefore concluded that the analogous hypothetical tax base in the export market (for the United States) i.e., the amount which would have been taxed but for the exportation and to which the hypothetical tax had to be added in order to make a fair comparison between prices, was the sale to the first unrelated U.S. buyer.

Zenith Electronics Corporation ("Zenith") argues that Commerce erred in determining that the taxes forgiven on exportation of this merchandise would have been taxes based on the first sale to an unrelated purchaser in the U.S. market.

Zenith first argues that the Korean tax laws make the tax base the equivalent of the ex-factory price. It points out that for home market sales purposes under the Korean Special Excise Tax Act, television receivers are taxed on "the price at which the goods are carried out from the factory." [Goldstar January 5, 1990 questionnaire response, Appendix 1-2 at p. VI-288; remand Rec.P-Doc. 37, R. 1, Fr. 428.] It further asserts that the Defense Tax, insofar as it is a percentage of the Special Excise Tax, is also derived from the price at which the television receivers are carried out of the place of manufacture.

Finally, Zenith asserts that the value added tax has the same focus as the Special Excise Tax because inter alia, the place of the transaction is "where the moving of the goods starts." [*Id.* at page VI-268 (Art. 10, para. 1, item 1); Fr. 445.] Zenith also stresses that in response to Commerce's tax questionnaire in this remand, the Korean respondents all described the Korean home market taxes as percentages either directly or indirectly related to "the ex-factory price."

Zenith characterizes Commerce's action as the transformation of taxes forgiven upon exportation in the foreign country into taxes forgiven upon resale in another country, taxes which would hypothetically be levied on the amount of import duty paid to the United States government, and taxes which would not be calculated until months after the taxable event of exportation. Zenith characterizes this as an absurd result without foundation in the evidentiary record. Zenith also points out that Commerce's determination with respect to the tax base was a reversal of its position in its proposed remand results and was reached in response to comments by Daewoo and Goldstar on those results without giving Zenith an opportunity to address those comments. Zenith also notes the absence of a bar in the Korean tax law to the use of prices to related parties as the basis for tax assessments, arguing that even though the sales which it believes form the proper tax base may have been sales to related parties, there is nothing in the record to show that they would not be used as the tax base by the Korean authorities.

In response to Zenith's arguments, Commerce contends that it would have been arbitrary and capricious for

it to select a point in the continuum between manufacturing and marketing which differed from the point in Korea at which the taxes were actually imposed. It points out that initially it concluded that the Korean taxing authority would have imposed taxes on the exported merchandise on the basis of the f.o.b. Korean port price. However, when Daewoo pointed out that the taxes in question are imposed in the Korean home market on the net price to the dealer, Commerce assertedly realized that the f.o.b. Korean port price did not properly correspond to the actual Korean tax base, which, in practice, was the net dealer delivered price, i.e., the price to the first unrelated home market buyer. The defendant argues that there is nothing in the law which precludes a conclusion that the Korean taxing authorities would impose a tax on exported colored television receivers at the same point in the export market as they do in their own home market. Zenith contends that the mere fact that, in this case, the net unrelated dealer delivered price happened to be the first price at which the goods left the factory, does not mean that in those situations in which the goods left the factory at a price to a related party that selfsame price would not be the proper tax base.

In the opinion of the Court, the Commerce Department acted without the support of substantial evidence in the record when it sought to find an analogous point for fixing the tax base in the United States and when it concluded that, if the Korean taxing authority were to impose taxes on exports to the United States, which taxes were to be rebated, the amount of those taxes would be determined by multiplying the tax rate by the amount of the first sale to an unrelated party in the United States.

This is obviously a response to a hypothetical situation which is unavoidably raised by § 772(d)(1)(C) of the Act but that does not justify departing from the evidence of record without the support of other substantial evidence. The record supports the view that the tax base in the home market is the price at which the goods are carried out of the place of manufacture. This basic fact would indicate that, in the absence of any other evidence in the record that the exportations involved here would be treated differently, the ex-factory price is the only properly supported point for determining the tax base. In this context the plain mandate of the Korean tax law is a matter of fact. The attempt to hypothesize about how the Korean government would depart from that point is not a matter of fact, but a matter of unsupported speculation.

It does appear that in the Korean market the taxable events were sales to unrelated dealers, but that just happened to be the type of price at which the ex-factory transaction occurred. There has been no showing that the price at which the goods left the factory would have been ignored if it had not been a price to unrelated dealers. There has been no showing, and there can be no presumption, that a price to related parties would be rejected if it happened to be the price at which the goods left the factory. In short, there is no evidence in the record to contradict the plain conclusion based on Korean law, that the price for exportation at which the merchandise left the place of manufacture would have been the tax base, if indeed a tax was to be imposed on exportations. There is no evidence that the Korean tax authorities would reject the price for exportation, or would prefer a U.S. resale price, either in its entirety or somehow modified to

remove from it various elements which would bring it closer to an ex-factory price for exportation between unrelated parties. This indicates that the only conclusion supported by evidence in the record is that the tax amount forgiven on exportation is an amount which would have been assessed on the ex-factory price for exportation. Commerce will be required to change its calculation of forgiven taxes accordingly.

The Commerce Department also failed to cap the adjustment at the amount of tax in Korea. The Commerce Department now agrees with Zenith that it inadvertently failed to follow the standards set out in *Zenith Electronics Corp. v. United States*, 10 CIT 268, 633 F.Supp. 1382 (1986), *appeal dismissed*, 875 F.2d 291 (Fed.Cir. 1989) ["Zenith 1"]. In that opinion the Court held that, after determining the amount of taxes applicable to the home market and the U.S. market, the Commerce Department should compare the two and in each instance increase U.S. price by the lesser of those two amounts. Accordingly, the case will be remanded to Commerce to make this particular correction as well.

In its first decision in this case, the Court forbade Commerce to assume that home market taxes passed through fully to consumers in Korea. The Court required Commerce to measure the amount of pass-through. On remand, Commerce performed an econometric measurement of pass-through and determined that all of the commodity tax was passed through to consumers. That econometric measurement is now under attack by Zenith and by the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO;

International Brotherhood of Electrical Workers; Independent Radionic Workers of America; and Industrial Union Department, AFL-CIO; [the Unions].

What Commerce did was to set up a model of the economic factors involved in the Korean home market. The intention was to see whether the commodity tax would be fully included in the price as a result of factors controlling the production side of the market, and then see whether the demand side of the market would allow the full commodity tax to be included in the price. The econometric method makes quantitative estimates of the various economic factors which affect supply and demand and indicates to what extent those two elements of the market will permit a tax to be included in the price. The technique by which these analyses are made is a mathematical one using mathematical and statistical methods to analyze data regarding costs, prices, sales volume and similar factors to arrive at the most likely description of the behavior of those involved in the market.

The form taken by the mathematical and statistical analyses is that of graphs with one line or curve representing the supply and the other line or curve representing the demand. The relationship between these lines can be used to reveal the effect which an increase in price has on consumption. The price indicated by the intersection of these lines is the "equilibrium price," the price that consumers are willing to pay and manufacturers are willing to accept. Depending on the position and shape of the lines, the equilibrium price can change. Depending on the shape of the graphic lines such graphs can indicate whether an increase in price will be fully accepted by

consumers, or will be met with a response which causes a lower quantity of the merchandise to be sold.

The responsiveness of these lines to the economic factors which affect them is termed their "elasticity." For example, the demand curves for such things as are considered the necessities of life tend to have relatively *inelastic* demand curves, that is to say, the demand will not fall off significantly in response to price increases or rise much in response to price decreases. On the other hand, the demand curves for so-called luxury items tend to have relatively elastic curves which means that demand is very responsive to changes in the price of these commodities.

On the supply side, the elasticity of the supply curve relates to the economic factors which arise in producing the commodity in various quantities at various scales of production. When a supply curve is inelastic that indicates that increased costs of making and selling the commodity do not affect the producer's willingness to supply the commodity at a higher price. On the other hand, an elastic supply curve is one which shows that the increased costs of producing or selling the commodity reduces the amount the producers are willing to supply.

As applied in this case, the supply curve discussed in general terms above, was replaced by cost curves for the producers. These cost curves were found to be such that increases in production would not increase the cost of producing the additional television products. This can be stated as a finding that in the Korean color television market the cost elasticity is one, or, that the production of the product shows constant returns to scale. The fact that

additional production does not raise unit costs leaves a manufacturer free to increase its production in accordance with its motivation of maximizing its profits. The production side of the Korean television market was found to exhibit imperfect competition of an oligopolistic type which means that only a few suppliers exist, with each one having a meaningful brand identity, consumer loyalty and some power to set its own prices. It is clear from the record that on the production side of a market such as this, when an excise tax is imposed on the producers, they will have the will and the capacity to raise their prices by the amount of the tax, if we consider only the factors operating on their side of the market equation.

There has been no significant dispute with this aspect of the determination by Commerce on remand. It can therefore be concluded that it would be the tendency of the Korean firms to raise their prices in the full amount of the excise tax unless such price increases would be influenced by factors coming into play from the demand side of the market. This gives central importance to the conclusions reached by Commerce with respect to the demand curve.

The demand curve will indicate to what extent higher prices might mean lost sales and might require the firm to balance the increased price per unit with the decreased quantity of units sold.

Zenith argues that when it came to the formulation of the demand curve, Commerce did not proceed in accordance with the law. Zenith claims that Commerce's choice of a demand curve for color television receivers in Korea

is an assumption which is not based on substantial evidence, which cannot be reconciled with known characteristics of that market, and which was not adequately tested against the data base relevant to choosing a demand curve.

The demand curve in issue has a form which indicates that demand elasticity in the Korean market is constant. This means that when the factors on the supply side, namely, the cost elasticity of one, show that the tax will be fully included in price by the producers, demand for the television receivers will not significantly decrease when the prices rise. This would indicate that all of the tax imposed on the producers can and will be passed through to the consumers.

The government defends its determination of the nature of the demand curve as preferable over other forms on theoretical grounds and as supported by the economic literature. The government also asserts that its demand curve, termed as "iso-elastic demand function" was to be preferred because the alternatives were not supported by the data contained in the study of the Korean market. However, the alternatives do not appear to have been tested against the actual data.

This brings us to another issue connected to the dispute over the measurement of pass-through. The data base to which Commerce applied its measurement of the market characteristics was one which was aggregated. This means that Commerce combined the data for all of the Korean respondents and for the different types of television receivers. Commerce also transformed the quarterly data of two respondents into semi-annual data

in order to accommodate the fact that the third respondent had only supplied semi-annual data. Zenith argues that this aggregation of the data base precluded a determination of whether the amount of pass-through differed between the various respondents and between various types of television receivers. Commerce argues that such an approach was preferable to excluding the respondent which supplied semi-annual data from the data base and relying on the best information available to make a calculation for that respondent. Commerce also argues that it is not uncommon for empirical research on economic phenomena to accomplish a sound result based on limited data.

After close study of this aspect of the dispute, and even after allowing for the fact that econometric techniques cannot be expected to have perfectly accurate methodology, the Court finds unacceptable defects on the demand side of the Commerce determination. Although Commerce makes theoretical objections to the various alternative shapes of demand curves proposed by Zenith, it does not appear to have actually made a full fledged attempt to apply those curves to the data base and to determine whether they might not conform to the data and explain its behavior better than the iso-elastic form used to reach the determination challenged here. What this amounts to, in the opinion of the Court, is a lack of adequate connection between a crucial determination and the evidence in the administrative record. This is simply another way of saying that the demand function and the results which arise from its use are not supported by substantial evidence on the record. It may have a theoretical basis and it may have support in the literature but

it has not been shown to be sufficiently supported by facts in the record. In the absence of reliance on evidence derived from the data, which justifies the choice of one demand curve over another, the Court cannot affirm the results of this remand. Unless that is done, the results have the appearance in the end of being ordained by selection of the demand curve rather than arising from, and being based on, the data in the record. In other words, if one demand curve is to be selected as the one which most accurately reflects the realities of the market, Commerce is obliged to explain what data in the record qualifies that curve for a preferred role, and disqualifies the other possible demand curves. It is not enough to simply disqualify alternatives on theoretical or academic grounds.

The Court is also of the opinion that the aggregation of the data for purposes of measuring the pass-through cannot be reconciled with the obligation to base such findings on substantial evidence. It appears to the Court that the amalgamation of all the data from different respondents and different products into one composite is equivalent to the creation of a non-existent single firm, producing an undifferentiated product, and therefore does not have sufficient connection to the reality of the market place. Conceivably, such an aggregation might be justifiable if there was no other way to treat the data. However, in the past, Commerce has successfully disaggregated such data and analyzed it by producer and by product category. In fact, this was done in an antidumping case involving Japanese television receivers in which less data was available than in this case. There is a contradiction between the way Commerce used two

levels of disaggregated measurement in a remand determination involving Japanese television receivers, in which even less data was available, and the way it treated data in this remand involving Korean television receivers. See Determination on Remand (dated April 14, 1987) filed in consolidated C.I.T. No. 85-06-00788, Perloff Report (dated April 8, 1987) at 6.

It is the opinion of the Court that in order to test the extent of pass-through of taxes to consumers, at a minimum, the relevant data must be utilized, as it has in the past, in a way which recognizes the separate identity of different producers and the existence of major commercial distinctions or types of products within the market for television receivers. For the reasons given above, Commerce's measurement of pass-through cannot be affirmed. This aspect of the case must be remanded to Commerce to perform the analysis on a disaggregated basis, to consider alternative forms for demand curves and explain the evidence from the data which justifies its choice of one form over others.

In short, it is the opinion of the Court that the evidence of record with respect to actual transactions in the market must be given a significant role in the choice of the form to be applied in the course of econometric measurement. The form cannot be allowed to become a Procrustean bed into which the evidence is fitted. Without a strong demonstration of linkage between the data and the chosen form, the threat exists that the administrative process can become a matter of choice between theoretical techniques which are equally defensible in the abstract, but which do not have a proper grounding in substantial evidence.

The Unions have made an additional argument against the correctness of the Commerce Department's procedure in reaching a determination regarding the extent to which the commodity tax was passed through to the consumer. The Unions argue that Commerce should only have adopted a methodology to measure pass-through, and should have left it as the burden of the respondents to prove what the pass-through was in their transactions.

The government responds that its procedure was mandated by the terms of the Court's remand and furthermore, is the most efficient way to accomplish the process. With respect to this disagreement, the Court notes only that its instructions to Commerce to find a methodology for measuring pass-through should be understood as obligating the agency only to establish the methodology. From that point it is free to proceed as it did here or to impose an appropriate burden of proof on the respondents. In this case, the establishment of the methodology was required but the procedure by which it was to be applied to the facts was left to the authority of Commerce.

The Unions correctly point out the importance of the adjustment for tax pass-through in the administration of the antidumping law and its great potential for affecting dumping margins, but those factors indicate only the essentiality of adherence to legal standards and do not dictate that the burden of proof for such adjustment must be wholly placed on the respondents.

Both Zenith and the Unions have requested the Court to certify its ruling for immediate appeal so that the

recurring question of pass-through measurement may be decided with finality. However, the Court does not find that the issue satisfies the requirements for certification.

The Korean interests continue to argue for a circumstances of sale adjustment to account for differences in the amount of commodity tax included in foreign market value and in United States price. This recurring argument is based on the fact that dumping margins, to a certain extent, become increased by a so-called "multiplier effect" when the adjustment for foreign commodity taxes required by 19 U.S.C. § 1677a(d)(1)(C) (1988) is accomplished by adding to U.S. price the amount of home market taxes that would have been imposed on the sale had it been made in the home market. Commerce performs this adjustment by multiplying the U.S. sale price by the home market tax rate and adding the resulting amount to U.S. price.

Repeating the example given in Footnote 9 of *Zenith Elec. Corp. v. United States*, 10 CIT 268, 273, 633 F.Supp. 1382, 1386 (1986), if the home market price, excluding the tax, is $100, and the U.S. price is $90, the dumping margin would be $10. If a 50% foreign commodity tax was to be added to both the home market and the U.S. price, the foreign price would become $150, the U.S. price would become $135, and the margin would now become $15, $5 more than the theoretical neutral dumping margin. With respect to this occurrence, the Court adheres to its view that a circumstance of sale adjustment, to fully offset the absolute difference in tax amounts arising from a pre-existing dumping price, is not in accordance with the law. However, the Court has noted that it is possible for the multiplier effect to result from differences in the home

market and U.S. tax bases which are not related to pre-existing dumping margins. (10 CIT at 281 n. 22, 633 F.Supp. at 1393 n. 22.) The Court now clarifies its views on how the previously expressed opinion with respect to the use of circumstances of sale adjustments should be applied in this case.

It is the opinion of the Court that the consequences of pre-existing dumping margins are not appropriate for correction as circumstances of sale. This would go beyond the intention of the statute and would represent an unreasonable interpretation of its terms. However, by the same token, when the "multiplier effect" can be attributed in whole or in part to bona fide differences in the circumstances of sale, then those differences should be accounted for and the multiplier effect should be mitigated to the extent that it is generated by those factors. Commerce can do this by multiplying the net adjustment to home market and U.S. price for differences in such things as moving expenses, selling expenses, duty draw-back, and physical characteristics of the merchandise, by the tax rate, and then deducting that additional amount from home market price in arriving at foreign market value. So long as this can be done without eliminating the consequences arising from pre-existing dumping margins, it would be the proper application of the law and of its intent that adjustments be made for those factors which arise from genuine differences in the circumstances of sale of the sales being compared. The Court views Commerce's expressed reluctance to make such secondary-level adjustments as tantamount to a decision not to do so and therefore considers it appropriate to issue directions on this point. Accordingly, on this

remand, Commerce will be required to make circumstances of sales adjustments consistent with the aforementioned distinctions.

Several of the parties have brought to the attention of the court a number of errors in calculations about the existence of which there appears to be no serious dispute. What resistance there has been to the corrections of those errors appears to arise from procedural objections. Commerce has taken the position that it was barred from addressing errors not pointed out in the Court's remand decision by this Court's ruling in *Zenith Electronics Corp. v. United States*, 699 F.Supp. 296 (C.I.T. 1988), *aff'd*, 884 F.2d 556 (Fed.Cir.1989) that Commerce was prohibited from making changes in the final result without the express authorization of the Court. Although that holding should not have prevented any application to the Court for the purpose of correcting errors, the focus of the Court at this time is to determine whether the errors should be corrected now. The important thing is to correct the errors and not to be impeded by any obstacles other than those required by law. See *Serampore Industries PVT, Ltd. v. U.S. Dept. of Commerce*, 696 F.Supp. 665 (CIT 1988).

The Court's review of the record and consideration of the arguments of the parties lead to the following conclusions:

Zenith demonstrated that the foreign market values for Goldstar fell short of the amount equivalent to the 50.04% of average home market prices net of tax. Goldstar has revealed that this substantial understatement arose, from a ministerial error by Commerce, namely, its

failure to define fields in its data base that were sufficiently large to accommodate the tax value reported by Goldstar. This amounts to a clerical error and should be corrected on remand. The government argues that the need for this correction was not raised previously. What is important, however, as Goldstar itself notes, is that the erroneous home market tax values did not play a role in Commerce's calculations prior to the issuance of the draft remand results. Furthermore, it was only the final administrative remand results that brought the use of erroneous home market tax amounts under scrutiny by counsel. Even if the Court was to set stricter standards for raising such issues, it would be reasonable to consider this as the first appropriate time for raising that error.

Goldstar has suggested alternative means by which that error may be corrected, but because those means involve converting Goldstar's submitted raw data file into an SAS data set, a technique which has been prone to problems, the Court adopts Zenith's suggestion that the most reliable means of correction would be for Commerce to calculate the tax amounts in a consistent manner for both markets. Therefore, on this remand, Commerce is instructed to calculate Goldstar's home market tax amounts by multiplying the tax bases (net home market prices) by 50.04%. The Court notes that this error was clearly inadvertent in nature and does not indicate in any way that Goldstar under-reported home market taxes.

Goldstar points out that it was adversely affected by Commerce's failure to eliminate the deductions from Goldstar's exporters sale price ["ESP"] of an amount representing accounts receivable from the parent company. In addition, the dumping margin calculation was

affected by a clerical error regarding a reduction of duty drawback by a wastage factor, which error was first brought to Commerce's attention during the remand proceeding. On this remand, Commerce will be required to correct both of those errors.

With respect to Goldstar, Zenith points out that Commerce failed to analyze one Goldstar purchase price transaction, but nevertheless included full U.S. price for that transaction in the denominator used to ascertain Goldstar's weighted-average margin. Although Goldstar and Commerce correctly point out that the Court did not specifically address this error in its first remand decision, it is unquestionably an error. Its triviality is not apparent and it should be corrected on this second remand.

Zenith has also pointed out errors in the calculation of average values used to generate foreign market values for Daewoo. This arose from the use of numerous home market "sales" between related Daewoo parties, which Daewoo acknowledges were only paper transactions and not the sort of sales which should be included in these calculations. It is unquestionable that consideration of these paper transactions skewed the average home market prices derived by Commerce and resulted in an understatement of foreign market values for Daewoo. In the Court's opinion, this error is of a clerical or ministerial type and the Court approves the method suggested by Zenith for correcting it. The proper way to correct this error is for Commerce to correct the home market data based used to calculate average fair market values for Daewoo by excluding consideration of the related party paper transactions altogether, and Commerce is directed

to do this by means of the program instructions suggested by Zenith in its initial brief.

Zenith has also pointed out another error in Commerce's analysis of Daewoo's ESP transactions which apparently arose from the incorrect designation of a certain home market model as the comparison model for model TCK405P. The Court agrees with Zenith that the appropriate solution is to designate home market model TCK406PW as the comparison for sales of export model TCK405P and Commerce will be required to correct the error in this manner on remand.

Zenith has also raised an objection to Commerce's treatment of certain expenses incurred by Goldstar in replacing its own brand name plate with private brand name plates on certain shipments of television receivers. In the remand of this case, Commerce had been directed to address the adjustment to Goldstar's U.S. price for the cost of replacing the brand name plates. (712 F.Supp. at 958.) On remand, Commerce treated that expense as an indirect selling expense and deducted the cost of the replacement name plates in recalculating U.S. price for ESP sales. In addition, Commerce allocated the expense by apportioning it over all ESP sales, not simply over those television sets on which the name plates were changed. As to the second step, Commerce now agrees that it was an error to allocate the expense of changing the name plates over all television sets and it will be required to make an appropriate allocation over the television sets affected by the name plate change on this remand.

The characterization and treatment of these nameplate costs, prior to allocations, still remains in dispute. Zenith argues that such an expense must be accounted for as a deduction from ESP of post-importation U.S. value-added, under 19 U.S.C. § 1677a(e)(3), which provides for adjustment for "any increased value, including additional material and labor, resulting from a process of manufacture or assembly" performed on imported merchandise in the United States. The government argues that the replacement of nameplates is not the type of activity contemplated by § 1677a(e)(3) and suggests that it is not a sufficiently substantive part of the manufacture or assembly of the television set. The Court is of the opinion that the work of replacing nameplates falls literally within the meaning of the statutory terms and that it would not be in accordance with the statute to develop additional standards for the substantiality of manufacturing or assembling work. The affixing of labels is part of the process of assembly at the very least and its relative importance in that process should not be the determinant of how it is to be accounted for. It was unlawful to treat such expenses as indirect selling expenses and subject to offset by indirect home market selling expenses. It was also error to consider such costs in the calculation of the ESP offset cap. Commerce will be required to correct its error by attributing such costs directly to the sales of private labeled sets as further processing costs provided for in 19 U.S.C. § 1677a(e)(3).

For the reasons given above, it is hereby ORDERED, ADJUDGED AND DECREED that the case is remanded to Commerce for the correction of errors found in its first

redetermination on remand in accordance with this opinion; that it shall use ex-factory prices to determine the taxes forgiven by reason of exportation of Korean television receivers and shall cap the upward adjustment of U.S. taxes for such forgiven taxes passed through to home market purchasers of comparison merchandise; that with respect to the measurement of tax pass-through, Commerce shall perform the measurements on a disaggregated basis for each respondent and for the different types of television receivers; and that Commerce shall consider alternative forms of demand curves and specify the evidence in the record which makes its chosen curve a superior representation of the facts with respect to demand in the home market.

It is further ORDERED that Commerce shall include in its tax determination a circumstance-of-sale adjustment for those differences arising from bona fide circumstances of sale and not from pre-existing dumping margins; and it is further ORDERED that Commerce shall correct the understatement of foreign market values for Goldstar, shall adjust the U.S. price for Goldstar's replacement of nameplates, correct its failure to analyze one Goldstar purchase price transaction, shall exclude the paper transactions in the calculation of Daewoo's average values, and designate the proper model for comparison with export model TCK405P.

It is further ORDERED that Commerce shall issue a redetermination on remand, consistent with this opinion, within 60 days and transmit said redetermination to the Clerk of this Court. In all other respects, the motions pending before the Court are denied.

DAEWOO ELECTRONICS COMPANY, LTD., et. al., Plaintiffs,

v.

The UNITED STATES, Defendant.

Court No. 85-01-00140.

United States Court of International Trade.

April 3, 1989.

Foreign manufacturers exporters of color television receivers from Korea challenged determinations of International Trade Administration of Department of Commerce in final results of first administrative review regarding importations of CTRs from Korea that resulted from anti-dumping order. The Court of International Trade, Watson, J., held that: (1) circumstance-of-sale adjustment should be made to foreign market value for differences in bad debt expenses between United States and home markets similarly to adjustment made for warranty expenses; (2) whether management, marketing, and advertising expenses of foreign manufacturer exporter incurred postacquisition of producer were start-up costs excludable in determining sales at less than cost of production that would be excluded in determining foreign market value should have been considered; (3) selling expenses not incurred within territory of United States that related to export sales in United States were deductible from exporter's sales price in determining antidumping duties; and (4) Tariff Act section did not limit actual assessment of antidumpting duty to preliminary rates of estimated duty, but rather, if merchandise were entered

prior to final determination, rates established in preliminary determination would serve as assessment cap, while if merchandise were entered after preliminary rate were raised as result of final determination, that higher rate would serve as limit of actually assessed duties for entries which were made prior to final injury determination.

Affirmed in part; remanded for reconsideration in part.

See also, C.I.T., 655 F.Supp. 508.

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Dow, Lohnes and Albertson, William Silverman, Michael P. House, Ryan Trainer, and Douglas J. Heffner, Washington, D.C., for plaintiffs Gold Star Co., Ltd. and Gold Star Electronics Intern., Inc.

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John R. Bolton, Asst. Atty. Gen., David M. Cohen, Director, Commercial Litigation Branch, Jeanne E. Davidson, Civ. Div., U.S. Dept. of Justice (Robert E. Nielson, of counsel), U.S. Dept. of Commerce, Washington, D.C., for defendant.

MEMORANDUM OPINION
AND ORDER

WATSON, Judge:

Plaintiffs in this consolidated action challenge the determinations of the International Trade Administration of the U.S. Department of Commerce (ITA or Commerce) in the final results of the first administrative review with regard to importations of color television receivers (CTRs) from Korea, which were published on December 28, 1984 (49 Fed. Reg. 50420).

The importations of CTRs from Korea are subject to administrative review under Section 751(a) of the Tariff Act of 1930, as amended, (the Act) 19 U.S.C. § 1675(a) as a result of the antidumping order of March 1, 1984 (49 Fed. Reg. 7620).

Plaintiffs Daewoo Electronics Co., Ltd. and Daewoo Electronic Corporation of America, Inc. (collectively "Daewoo"), Gold Star Co., Ltd. and Gold Star Electronics International, Inc. (collectively, "Gold Star"), Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively "Samsung") are foreign manufacturers and exporters of CTRs from Korea, and respondents in

the administrative proceedings subject to this judicial review.[1]

Zenith Electronics Corporation ("Zenith") and the Independent Radionic Workers of America, the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO-CLC, the International Brotherhood of Electrical Workers, and the Industrial Union Department AFL-CIO (collectively the "Unions") are the defendant-intervenors, as well as plaintiffs in a consolidated action challenging the final results of this administrative review. Zenith and Unions are domestic interested parties who participated in the proceeding below as petitioners. The Court has jurisdiction over these consolidated actions pursuant to 28 U.S.C. § 1581(c).

BACKGROUND

Within a few days after publication of the antidumping order, plaintiffs Gold Star and Samsung requested Commerce to conduct an expedited review and early

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[1] Plaintiff Daewoo is a successor to Taihan Electric Wire Co., Ltd., which was a named respondent in the antidumping petition, and which was later acquired by Daewoo during the initial investigation. The antidumping order did not establish a company-specific deposit rate applicable to imports from Daewoo and, therefore, these imports were entered under the rates applicable to all other companies which were not specifically investigated.

determination of dumping duties pursuant to Section 736(c) of the Act, 19 U.S.C. § 1673e(c).[2]

The requests to conduct a section 736(c) review was accompanied by the information required under that section in order to determine the foreign market value and

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[2] 19 U.S.C. § 1673e(c) provides:

(c) Security in lieu of estimated duty pending early determination of duty. –

(1) Condition for waiver of deposit of estimated duties. –

The administering authority may permit, for not more than 90 days after the date of publication of an order under subsection (a) of this section, the posting of a bond or other security in lieu of the deposit of estimated antidumping duties required under subsection (a)(3) of this section if, on the basis of information presented to it by any manufacturer, producer, or exporter in such form and within such time as it may require, it is satisfied that it will be able to determine, within 90 days after the date of publication of an order under subsection (a) of this section, the foreign market value and the United States price for all merchandise of such manufacturer, producer, or exporter described in that order which was entered, or withdrawn from warehouse, for consumption on or after the date of publication of –

(A) an affirmative preliminary determination by the administering authority under section 1673b(b) or this title, or

(B) if its determination under section 1673b(b) of this title was negative, an affirmative final determination by the administering authority under section 1673d(a) of this title

and before the date of publication of the affirmative final determination by the Commission under section 1673d(b) of this title.

the United States price of the entries made between October 19, 1983, the date of the preliminary determination of the ITA when liquidation of the subject merchandise became suspended, and April 25, 1984, the date of the final injury determination of the International Trade Commission (ITC).

Commerce denied parties' request to conduct an expedited review pursuant to Section 736(c) of the Act. Instead, the ITA undertook to conduct its regular Section 751(a) administrative review on an expedited basis. The ITA did not issue its usual Section 751 instructions and questionnaires requesting the appropriate sales information to Gold Star and Samsung, but proceeded to use sales information which had been provided by these parties to accompany their request for a Section 736(c) review. In view of the fact that Daewoo had not applied for a Section 1736(c) review and did not provide the sales information which must accompany such requests, the ITA issued a questionnaire with instructions to Daewoo requesting the sales data for the same period.

According to the expedited schedule initially established by the ITA, the final results of this administrative review were due by October 31, 1984. Commerce proceeded to conduct verifications of plaintiffs' data in July, 1984, and published its preliminary results of this administrative review on September 12, 1984.

In response to requests from the parties, the ITA extended its deadline for completion of this review to December 15, 1984. The ITA provided the parties with an opportunity to submit additional information, and announced that it would conduct a second verification.

The ITA conducted a second verification of plaintiffs' information in November, 1984. Commerce issued a "revised preliminary results", which were not published in the Federal Register, but consisted of the revised computer printout and a memorandum dated November 28, 1984.

The ITA published the final results of this administrative review on December 28, 1984 (49 Fed. Reg. 50420). The final results of this administrative review established the weighted averaged dumping margins of 12.23, 7.47 and 14.88 percent for plaintiffs Samsung, Gold Star and Daewoo, respectively.

Plaintiffs challenged the final results of this administrative review on grounds which involve the calculation of Foreign Market Value (FMV), the calculation of United States prices, and matters of administrative procedure.

I. PLAINTIFFS' ARGUMENTS WITH REGARD TO FOREIGN MARKET VALUE.

(a) Samsung alleges that the ITA erred in refusing to adjust FMV for bad debt expenses, which plaintiff experienced in the Korean market during this administrative review, in violation of 19 U.S.C. § 1677b(a)(4)(B).

(b) Daewoo alleges that the ITA improperly excluded certain below costs sales from calcuation of FMV in violation of 19 U.S.C. § 1677b(b)(2).

(c) Plaintiffs allege that in making a difference-in-merchandise adjustment to FMV for differences in duties incurred on some imported parts of the merchandise, Commerce erred in

calculating and deducting the amounts of import duties from home market sales, instead of comparing FMV to the U.S. prices on a duty-included basis.

(d) Daewoo and Samsung allege that in making the adjustments for differences in credit expenses between the U.S. and home market, Commerce erred in using rates of credit based on the best information available, instead of applying the actual rates of credit which were experienced by plaintiffs in the home market.

(e) Samsung alleges that the ITA failed to make appropriate adjustments to FMV for warranty expenses and volume rebates which were substantiated and duly verified.

(f) Daewoo contends that the ITA failed to include the amount of selling commissions incurred in the United States in its calculations of the off-set deductions for indirect selling expenses from FMV.

II. PLAINTIFFS' ARGUMENTS WITH REGARD TO THE UNITED STATES PRICE.

(g) Plaintiffs allege that the ITA erred in determining that the account receivables from their related companies represent deductible selling expenses which were assumed by such related companies on behalf of the U.S. exporters.

(h) Samsung alleges that Commerce erred in treating the legal fees, which were incurred during this review period in connection with the previous antidumping proceeding as selling expenses deductible from the U.S. price.

(i) Plaintiffs claims that the ITA erred in treating their U.S. export-related selling expenses, which were not incurred within the territory of the United States, as deductible from the U.S. price under 19 U.S.C. § 1677a(e)(2).

(j) Plaintiffs allege that the ITA erred in adjusting the exporter's sales price for imputed credit expenses associated with inventory carrying costs which are incurred between the time the merchandise is exported from Korea and the time it is sold by their U.S. subsidiaries to unrelated purchasers in the United States.

III. PLAINTIFFS' ARGUMENTS WITH REGARD TO ADMINISTRATIVE PROCEDURE.

(k) Plaintiffs contend that section 737(a) of the Act, 19 U.S.C. § 1673f(a) imposes a limitation on the amount of antidumping duties to be assessed as a result of this administrative review, so that they may not exceed the estimated rates of antidumping duties which were established in the preliminary determination of the initial less-than-fair value (LTFV) investigation of the ITA.

(l) Plaintiffs contend that the ITA improperly refused to disclose certain computer printouts containing calculations of the margins for the final results of this administrative review and request the Court to address this issue, notwithstanding their subsequent access to the printouts as a result of bringing this action.

(m) Plaintiffs request the Court to remand the final result of this administrative review to the ITA for correction of certain clerical errors.

IV. ADDITIONAL ARGUMENTS OF PLAINTIFFS ZENITH AND UNIONS.

(n) Zenith and Unions allege that pursuant to 19 U.S.C. § 1677a(d)(1)(C) the ITA was required to add to the U.S. price the amount of taxes which were collected on all sales of the merchandise in the home market and which were rebated or not collected by reason of exportation to the United States, and only to the extent that these taxes were passed-through to the Korean consumers, instead of deducting the full amount of these taxes from FMV.

(o) Zenith and Unions challenge the ITA's practice of applying the weighted average antidumping duty rates, which were established in these final results of the administrative review, to the entered invoice value of the future entries of the merchandise, rather than their statutory U.S. price, for duty deposit purposes.

(p) Zenith and Unions allege that in calculating Daewoo's costs of producing the merchandise, the ITA mistakenly omitted the amount of certain rebates which were made by Daewoo on some home market sales.

(r) Zenith and Unions allege that the ITA failed to account for costs of the additional nameplates, which were installed on Gold Star's exported merchandise, by either making an adjustment to FMV for physical differences in the merchandise under comparison, or by including the value added by the additional nameplates in its calculations of the U.S. price.

I. CALCULATIONS OF FMV

(a). *Treatment of Bad Debt Expense in the Home Market.*

Plaintiff Samsung challenges the ITA's refusal to make a circumstance-of-sale adjustment to FMV for differences in bad debt expenses between the U.S. and home markets.

Samsung does not dispute that the bad debt expense in question resulted from sales which were made prior to this review period. At the same time, Samsung contends that bad debt expenses are similar to warranty expenses which are incurred with regard to prior sales and for which adjustments are usually granted by the ITA.

Samsung alleges that because the ITA allows the adjustments for warranty expenses, which are incurred during a period under review with regard to prior sales, bad debt expenses incurred with regard to prior sales, but realized during this review period, should also qualify for an adjustment as directly related selling expenses.

Defendant disputes Samsung's argument that warranty and bad debt expenses should be accorded similar treatment under the antidumping law. The ITA argues that according to the long-standing practice dating back to the administration of the law by the U.S. Department of Treasury, bad debt expenses qualify only as indirect selling expenses, unless they are directly attributable to the sales under review. In other words, the ITA contends that bad debt expenses must be incurred on the sales subject to the administrative review in question, and they must be written off or determined to be uncollectible during the period under review in order to qualify as

directly related expenses which can be deducted from FMV.

At the same time, the ITA does not dispute that it usually allows adjustments for warranty expenses which are calculated on the basis of warranty expenses incurred with regard to prior sales. Commerce justifies the difference in treatment between warranty expenses and bad debt expenses as follows:

> Warranty expenses are specifically subject to circumstance-of-sale adjustments under the regulations, as directly related expenses, even though the warranty expenses owing to the sales under review will not be incurred until after the review. 19 C.F.R. 353.15(b). Commerce uses warranty expenses incurred during the review as the best information available for those expenses that will arise with respect to the sales under review. See Adjustment Study at 39. Warranty expenses are, by their very nature, expenses directly related to specific sales. Bad debt losses, on the other hand, are not direct selling expenses related to particular sales unless and until they are written off under the home country's statutory procedure. Until that time, the bad debt is merely an account receivable, and not an *expense* incurred with respect to a particular sale, since it could still be collected. Warranty expenses, on the other hand, are always direct. Thus, use of best information is justified. However, since a bad debt loss remains an *indirect* expense until written off, it cannot be

used as a surrogate for a possible future *direct* expense.[3]

The Court does not discern from this reasoning by the ITA that a meaningful distinction exists between warranty expenses, which are supposedly "always direct," whether or not they are actually incurred with regard to the sales under review, and bad debt expenses, which are determined to be either "direct"or "indirect" depending on whether they are actually incurred with regard to the specific sales under review.

The Court does not find any support for the ITA's practice of using "warranty expenses incurred during the review with regard to previous sales as the best information available for those expenses that will arise with respect to the sales under review, while refusing to apply a similar method with regard to Samsung's bad debt expenses. [sic]

The ITA argues that until the bad debt loss is actually incurred, or written off, it is not a direct selling expense, but is "merely an account receivable . . . since it could still be collected." *Id.* This reasoning implies that an adjustment for bad debt can almost never by granted, because by the time Samsung attempts to collect the debt, the period of review with regard to which the debt has been incurred, and could be considered a direct selling expense, would ordinarily have expired.

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[3] Defendant's Brief in Opposition to the Motions of Daewoo, Samsung and Gold Star for Judgment upon the Agency Record (the "ITA Brief I") at 40-41 (emphasis in original).

The Court does not discern any logic in the ITA's reasoning that comparison of bad debt expenses to warranty expenses is not appropriate. The actual amount of both expenses are not usually known at the time of sales, because these types of expenses by their very nature are incurred sometime in the future when, and if, the merchandise malfunctions, or when a purchaser defaults. In other words, calculation of both types of expenses is always contingent on future events. Commerce's Adjustment Study explains:

> For some expenses, however, we may use costs incurred during a particular period as the best information available for expenses associated with the sales under consideration. For example, we have used warranty costs incurred during the period of investigation or historical warranty data incurred over a longer period as best information for warranty costs associated with sales made during the period of investigation, since the latter ordinarily would not be known until long after the period of investigation.[4]

Thus, the ITA estimates the amount of warranty expenses on the basis of the companies' current experience with regard to warranty expenses incurred on the past sales of the merchandise. This "best information" estimate is then deducted from FMV so that the built-in home market price surcharge for the potential warranty obligations would not distort the comparison of FMV to

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[4] "U.S. Department of Commerce Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change." U.S. Department of Commerce 1984.

the U.S. prices, when no warranty obligations are undertaken on U.S. sales of the merchandise. The ITA does not provide any explanation as to why an adjustment for a similar built-in surcharge to account for bad debt losses is not appropriate. Commerce does not dispute that bad debt losses do qualify as selling expenses, arguing only that bad debt losses, as opposed to warranty expenses, are not *direct* selling expenses, unless they are incured with regard to the sales under review. Absent any reasonable indication as to why the estimation of bad debt expenses based on past experience is any less reliable than the use of past experience for warranty expenses, this distinction between them is not proper.

The Court finds that the ITA administrative practice disregarding the selling expenses for bad debt losses, while granting adjustments for warranty expenses which are not incurred with regard to the sales under review, is arbitrary and is likely to result in distorted calculations of FMV.

Finally, the Court cannot accept the ITA's distinction in treatment between warranty and bad debt expenses, merely because warranty expenses are specifically listed in the regulations, 19 C.F.R. § 353.15(b),[5] while bad debt expenses are not specifically listed.

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[5] 19 C.F.R. § 315(b) provides:

(b) *Examples.* Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also will be made for differences in commissions. Allowances generally will not be made for

It is clear from the specific language of the regulations, that warranty expenses are listed merely as an example of allowable circumstances-of-sales adjustments and that the variety of such adjustments is in no way limited to the expenses specifically listed in the regulations.

The Court remands this issue to the ITA for reconsideration of a circumstance-of-sale adjustment for Samsung's bad debt losses in accordance with this opinion.

(b) *Exclusion of Sales at-less-than Cost from FMV*

Plaintiff Daewoo alleges that the ITA excluded certain home market sales from consideration in determining FMV in violation of Section 773(b) of the Act, 19 U.S.C. § 1677b(b).[6] The parties do not dispute that one

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differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

[6] 19 U.S.C. § 1677b(b) provides:

(b) **Sales at less than cost of production.** – Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production–

(1) have been made over an extended period of time and in substantial quantities, and

model of CTRs was sold in the home market below its costs of production in substantial quantities and over an extended period of time. Daewoo alleges, however, that Commerce was not authorized to exclude those sales from calculation of FMV, unless the second condition of Section 773(b) of the Act was also established to show that those sales were "not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade." 19 U.S.C. § 1677b(b)(2).

Daewoo asserts that the ITA failed to meet the second condition precedent which would allow for exclusion of these sales from the calculation of FMV. In particular, plaintiff asserts that the ITA failed to consider the long term nature of the start-up costs incurred by Daewoo when it entered the television market in March of 1983 by acquiring a Korean CTR producer, Taihan Electric Wire Co., Ltd.

Daewoo alleges that the "unusual, one-time advertising and customer relations expenses that were necessary in order to create a public awareness that Daewoo, a company that had never sold any consumer electric or electronic products, was now a substantial television supplier in Korea," qualify as start-up costs which would not recur in such a substantial amount in the normal course

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(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,

such sales shall be disregarded in the determination of foreign market value . . .

of trade, and which would be recovered within a reasonable period of time.[7]

The Court does not find within the statutory provision in question any specific criteria for ascertaining what business activities should be considered to be conducted in "the normal course of trade", nor does the statute specify what is "a reasonable period of time" within which the costs of production could be recovered in the normal course of trade. These determinations, therefore, fall within the discretion and expertise of the administering agency on a case-by-case basis.

The Court finds that the ITA violated its discretion by refusing to consider whether the post-acquisition management, marketing, and advertising expenses of Daewoo were in fact start-up costs in this particular case. Instead, Commerce concluded as a matter of administrative practice, that start-up costs are limited to investments in long-term capital assets, such as manufacturing facilities and machinery, or expenses associated with the development of a new product. Commerce refused to consider Daewoo's acquisition-related expenses merely because they were associated with an acquisition of production facilities which were a "going concern." In particular, Commerce asserts that "the costs Daewoo incurred for marketing and advertising were not the type of 'start-up' costs incurred by a company beginning initial production, such as capital investment and research and development, but rather, costs incurred to increase the market

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[7] Reply Brief on Behalf of Daewoo at 10.

share of a *continuing concern*. Expensive though this marketing campaign might have been, it is not a 'start-up' cost because Taihan was a continuing concern."[8]

Thus, Commerce acknowledges the extraordinary amount of these expenses, which indicates that they were not made in the normal course of trade. At the same time, Commerce ignored the unusual acquisition-related nature and the size of this expense focusing instead on the classification of the type of the expense: "In any event, such marketing and advertising activities are undeniably an ordinary part of the business of selling products such as television receivers."[9]

The legislative history of this provision provides the following guidance for making such determinations on a case-by-case basis.

> These standards would not require the disregarding of below-cost sales in every instance, for *under normal business practice in both foreign countries and the United States, it is frequently necessary* to sell obsolete or end-of-year merchandise at less than cost. Similarly, certain products, such as commercial aircraft, typically require large research and development costs which could not reasonably be recovered in the first year or two of sales.[10]

The absence of any restrictions in § 773(b)(2) with regard to the type and length of justifiable sales at less

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[8] The ITA Brief I at 50-51 (emphasis in original).

[9] *Id.*, at 51-52.

[10] S.Rep. No. 1298, 93d Cong., 2d Sess. (1974), U.S.Code Cong. & Admin.News 1974, at 7186, 7310 (emphasis added).

than cost as well as the nonexclusive nature of the legitimate examples of such practices in the legislative history indicate that the "normal" or justifiable business practices of sales below costs are not limited to sales of obsolete merchandise or merchandise which require extensive initial investments for research and development.

The statutory language and the legislative history indicate that these specifically described situations were only intended to serve as examples of justifiable sales below current costs of producing the merchandise. Rather, the open language of § 773(b)(2) indicates the intention of Congress that other circumstances might exist which could constitute a "normal business practice" justifying temporary sales below costs of production which should not be excluded from calculations of FMV. The commercial aircraft example in the legislative history also indicates that Congress intended to achieve flexibility with regard to the period over which these necessary additional expenses should be expected to be recovered.

Commerce's reliance on this legislative history to limit "the normal business practice" which could justify periodic below costs sales to start-up capital investments involving acquisition of new machinery or production facilities or development of a new product as a matter of administrative practice is not in accordance with the law.

The Court finds that Commerce has arbitrarily refused to consider whether the unusually high marketing and advertising costs incurred by Daewoo after acquiring a production facility of another company were

a normal and legitimate business practice under the circumstances. Instead, Commerce automatically treated these expenses as ordinary business expenses which should be recovered on a current basis.

Once Commerce refused to consider whether Daewoo's expenses were in fact a legitimate business practice which justified temporary below costs sales, the automatic use of the six-months period as "a reasonable period" within which these expenses should be recovered also fails to comply with the intent of the statute.

In *Toho Titanium Co., Ltd. v. U.S.*, 657 F.Supp. 1280 (CIT 1987), the court remanded the final determination of the ITA that below cost prices of titanium sponge in Japan would not permit recovery of all costs within a reasonable period of time, because it was not supported by substantial evidence on the record. While rejecting the argument that the entire business cycle of the industry in question should be considered "a reasonable period of time", *Toho* held that some projected period of time must be considered:

> Central to a proper determination by Commerce is some discussion on the record as to why the prices charged on sales by Toho will not allow recovery of its costs in a reasonable period of time. For example, if there is no change in Toho's cost of production then future sales at the prices charged during the investigatory period below cost logically could never recover all costs. If the cost of production declines in the future below the investigatory prices, however, then such prices may allow recoupment of all costs at some future date . . .

* * *

> The Court finds that Commerce must evaluate the prices charged by Toho during the investigatory period in relation to *projected cost of production* . . . in determining whether such prices will allow recovery of all costs in a reasonable period of time in the normal course of trade . . .

(*Id.*, at page 1286).

The statute clearly recognizes that the temporary nature of some unusually high costs which are incurred during the period under investigation requires prospective amortization of such costs over a reasonable period of time beyond the immediate review period.

This Court agrees that the issue as to whether losses from such below cost sales could be recovered "within a reasonable period of time" concerns a period subsequent to the investigation. The interpretation that the period already under review may constitute such "reasonable period" would lead to an absurdity, because the findings that the sales are made at less than their costs of production during the review period and a determination whether all costs could possibly be recovered during the *same* period are mutually exclusive.

The statute requires Commerce to determine a prospective period of time, which reasonably corresponds to the long-term nature of the business expense in question, over which period this expense should be amortized in order to determine whether all costs would be recovered at the observed sales prices.

Finally, the requirement to project sales "in the normal course of trade" over "a reasonable period of time"

in order to determine whether all costs could be recovered should not be confused with the decision in *Toho* "that Commerce may rely on data covering only a six-month period in making the determination" (*Id.*, at 1286). The ITA is clearly allowed to base its determination on the information collected during the current review period and without a need to monitor the actual future costs or prices for the purposes of this determination.

Daewoo also alleges that the ITA erred in conducting its less-than costs analysis on a model-by-model basis and that the average cost of producing all models during the review period should instead be used for comparison to Daewoo's home prices. Plaintiff fails to bring any legal support for this allegation, and, therefore, the Court does not see any reason to disturb the ITA's procedure of comparing both prices and costs of the most similar merchandise on a model-by-model basis.

The Court remands this issue to the ITA for reconsideration in accordance with this opinion. Commerce is directed to evaluate the specific circumstances of the case in making its determination as to whether post-acquisition expenses of Daewoo could be recovered over a reasonable period of time at the observed prices.

(c) *Difference-in-merchandise Adjustment for Import Duties on Parts of CTRs.*

In comparing foreign market value to the U.S. price of the subject merchandise, which contained various imported parts, the ITA made adjustments for physical difference between domestically sold and exported merchandise on a duty-excluded basis. Pursuant to the

Korean duty drawback law, exportation of the merchandise to the United States entitled plaintiffs to a refund of import duties which were incurred upon importation of those parts into Korea.

The ITA considered these duty refunds in determining the FMV of the merchandise and attempted to deduct from FMV the amounts of import duties which were incurred, but not refunded, on imported parts of domestically sold merchandise. Since it proved impossible to trace the amounts of import duties paid by various Korean suppliers of the imported parts, the ITA estimated the amount of such import duties at 30 percent of the actual costs of the component parts.

Plaintiffs allege that the ITA's calculation of the adjustment for physical differences on a duty-excluded basis is inconsistent with the prevailing administrative practice and is grossly distorted. In addition, plaintiffs assert that the estimation of import duties at 30 percent of the parts' costs is not supported by the evidence on the record.

The ITA admits that it committed an error by calculating an adjustment for physical differences in merchandise on a duty-excluded basis and requests a remand to correct this conceded error.

Zenith and Unions allege, however, that the ITA determination of this adjustment should be affirmed, because neither the statute, nor the regulations require this adjustment to be made on either duty-excluded, or duty-included basis.

The Court cannot find that the ITA has properly exercised its discretion when the agency itself concedes its error with regard to this issue admitting that this decision represents a departure from administrative practice:

> This attempt to exclude import duties from the cost of materials in calculating adjustments for physical differences represents a significant departure from the prevailing Commerce practice, which treats duty incurred on imported raw materials and passed on to manufacturers as part of material costs.[11]

The Court is remanding this determination to the agency for the reconsideration of this adjustment on a duty-included basis.

(d) *Selection of Interest Rates in Calculation of FMV.*

Commerce concedes that in calculating credit expenses incurred on sales in the home market between the time of sale and the time of payment with regard to Daewoo, the ITA improperly used a 10 percent interest rate which was based on "best information available", rather than the actual company-specific and verified information which was duly provided by Daewoo. Commerce admits that its failure to use Daewoo's actual credit expenses is not supported by substantial evidence on the record and requests a remand to recalculate this adjustment.

Plaintiff Samsung alleges that it had also provided information with regard to its actual interest expenses

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[11] The ITA Brief I at 14.

during this review period and that Commerce was required to use that information which was verified by the ITA.

The Court finds that the use of 10 percent interest rates with regard to both Daewoo and Samsung is not supported by substantial evidence on the record. The record indicates that the ITA did not conduct this administrative review in accordance with the established procedure. While denying plaintiffs' request to conduct the expedited review under Section 736(c) of the Act, the ITA began its regular administrative review under Section 751(a) of the Act soon after publication of an antidumping order, instead of awaiting for the first anniversary of the order. At the same time, Commerce proceeded to use information provided by plaintiffs in support of their expedited review requests under Section 736(c), instead of following the regular procedure of providing a questionnaire containing the appropriate instructions needed to compile the required information.

Samsung alleges that it was not informed in a timely manner of the specific requirements with regard to the form and methods of compiling the information substantiating the credit expenses. The ITA refused to utilize Samsung's calculation of its short-term credit experience, which was verified, because it included certain borrowings in the form of debentures, export, and import loans, which should not be included in such calculations. Samsung alleges that the ITA should have recalculated the interest expenses by excluding those loans, or alternatively, that the ITA should have considered the corrected calculations of the interest expense which were

subsequently provided by Samsung along with substantiating documents.

It has been established that Section 776(b) of the Act, 19 U.S.C. 1677e(b), requires Commerce to use "best information otherwise available", which can be detrimental to plaintiffs' interests, only when "a party or any other person refuses or is unable to produce information *requested* in a timely manner and in the form required, or otherwise significantly impedes an investigation." *Id.*, (emphasis added).

In *Atlantic Sugar, Ltd. v. U.S.*, 744 F.2d 1556, 1560 (CAFC 1984), the court defined the punitive nature of the best information rule as follows:

> In short, one may view the best information rule, as the ITC urges, as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest. One may as well view the rule, in light of the legislative history cited, as a club over the ITC's head, which Congress has brandished to force that agency to arrive at *some* determination within the time allotted.

In the case at hand, the ITA did not resort to the best information rule in order to insure compliance with the deadlines "allotted" by Congress, but attempted to complete this premature review within self-imposed deadlines. Nor did Samsung fail to cooperate in this review or otherwise impede the proceeding.

Moreover, the record indicates that Samsung's noncompliance consisted of providing too much information, rather than failing to provide adequate information,

which the ITA could analyze and reprocess in view of the ITA's own failure to provide instructions as to the methods of compiling the information.

Samsung was not given an appropriate opportunity to reshape its original Section 736(c) submission with regard to its credit expenses, so that it could meet previously unspecified requirements of the ITA. Before the ITA may find any non-compliance on the part of the parties to the proceeding, there must be a clear and adequate communication requesting the information, which is absent in this case.

The Court remands the determination to use best information otherwise available in calculations of both Daewoo and Samsung's credit expenses in the home market to the ITA for reconsideration, because it is not supported by substantial evidence on the record and is not in accordance with the law.

(e) *Deductions for Volume Rebates and Warranty Expenses in FMV Calculation.*

Commerce also applied the best information rule to calculate the adjustments for volume rebates and warranty expenses which Samsung incurred in the home market. Samsung alleges that these expenses were fully verified by the ITA during its first verification in July, 1984, and that Commerce never indicated that this information was either inadequate or not properly substantiated. Samsung alleges that the ITA did request that a new computer tape be submitted after the verification, "[b]ecause the verified information contained certain

revisions from Samsung's original May 1984 submission, . . . to save the Department [of Commerce] the time of keypunching the verified data into the computer".[12] Samsung asserts that the ITA refused to rely on this verified information stating that it was submitted too late and not in the right format, and that Commerce proceeded to use "best information otherwise available" under Section 776(b) of the Act to plaintiff's detriment.

The ITA defends its decision to use "best information available" by reiterating the conclusion of the final results under review, which states;

> Samsung supplied the Department with new computer tape over three weeks after the November 1, 1984 deadline. The tape was not formatted properly and the Department could not use it. Samsung was aware of the formatting requirements and had submitted a previous tape that was usable. Even if the tape in question were usable, the Department has serious doubts about using it at such a late date. The tape was submitted after the verification in November. Samsung claimed that it reflected the verification changes. If we had used that tape, we would not have had any opportunity to corroborate that claim. Manual correction by use of a new average number based on the verification would distort the customer-specific nature of the claim.

49 Fed. Reg. 50420, 50431.

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[12] Samsung's Brief at 47-48.

Similar to the issue of home market credit expenses, the Court cannot uphold the ITA's use of "best information available" in calculating the rebate and warranty adjustments, because Commerce failed to avail plaintiff of an opportunity to provide timely and complete responses, because Commerce did not request plaintiff to supplement its response with regard to these expenses until the verification, and because Samsung complied with the ITA's request to provide this information during verification. Subsequent submission of verified information on a new computer tape, which was allegedly not formatted properly, does not relieve Commerce's responsibility to utilize information which passed its verification scrutiny.

In the process of expediting this regular administrative review, presumably to compensate plaintiffs for the refusal to conduct the short Section 736(c) review, Commerce has curtailed certain normal procedural safeguards of this administrative proceeding. The Court remands this issue to the agency for reconsideration in accordance with this opinion and to provide plaintiffs with a meaningful opportunity to participate in the review.

(f) *Calculation of ESP Off-set Cap Limiting an Adjustment to FMV.*

The ITA also concedes that it erred in failing to include the amount of selling commissions in the U.S. market in calculating the so-called ESP off-set cap.

In addition to the circumstance-of-sales adjustments for differences in direct selling expenses between the U.S. and foreign market, Section 353.15(c) of the Regulations

provides for an adjustment to FMV for other selling expenses, which are incurred in the home market, but only to the extent of the ESP off-set cap:

> (c) *Special rule.* Notwithstanding the criteria for adjustments for differences in circumstances of sale set forth in paragraphs (a) and (b) of this section, reasonable allowances for other selling expenses generally will be made in cases where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expense incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

19 C.F.R. § 353.15(c). The amount of U.S. selling expenses which limit the size of adjustments for indirect selling expenses to FMV in exporter's sales price situations is called ESP off-set cap. The ITA's failure to include the amount of selling commissions incurred by Daewoo in the U.S. market in calculations of the ESP off-set cap, therefore, deprived plaintiff of a corresponding reduction in FMV and thus improperly increased the resultant calculations of dumping margins.

The Court remands the final results to the ITA for recalculation of the ESP offset cap in accordance with 19 C.F.R. § 353.15(c) as requested by the agency.

II. CALCULATION OF UNITED STATES PRICE.

(g) *Treatment of Account Receivables From Parent Companies as Indirect Selling Expenses.*

Samsung alleges that Commerce erred in treating the amount of the accounts receivable from the parent company, which appeared on its U.S. subsidiary's balance sheet as indirect selling expense, and deducting this amount in the calculations of ESP under 19 U.S.C. § 1677a(e)(2).

Commerce concedes that it erred in making these adjustments without establishing that these amounts in fact represent indirect selling expenses, which were incurred by the parent companies on behalf of their subsidiaries in the United States. The ITA concedes that "the mere *possibility* of an incomplete response – raised at the end of the case after all the verifications were complete – was not a sufficient reason to abandon the verified information".[13]

Zenith and Unions insist, however, that the adjustments were proper and claim, in addition, that similar adjustments should be made for Gold Star and Daewoo, because their financial documents also contain receivable "apparently representing receipts in advance of expense incurred."[14]

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[13] The ITA Brief I at 32 (emphasis in original).

[14] Motion of Zenith Electronics Corporation for Judgment upon the Administrative Record ("Brief in Chief of Zenith") at 26.

Zenith urges the Court to disregard Commerce's concession of the error, stating that it is not binding on the Court. Zenith relies on *Ashland Oil v. FTC*, 548 F.2d 977, 981-82 (D.C.Cir.1976):

> Even if government counsel had attempted to disavow the basis on which the FTC acted – and it is clear from the foregoing that he did not – his statements could not bind the court to ignore the rationale on which the FTC's decision was actually based. No principle of administrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than "accept appellate counsel's *post hoc* rationalizations," *Burlington Truck Lines v. United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962).

The Court finds that the issue before this Court is not whether the Court is bound by the agency's concession of its error, but whether the rationale upon which the ITA made the adjustments in question was reasonable, supported by the evidence on the record, and was otherwise in accordance with the applicable law.

The above quotation from *Ashland* indicates clearly that the government counsel in that case did not "disavow the basis" for the agency's action. *Id.* In the case at bar, however, the ITA does concede that it did not have any supportable rationale for disregarding the actual and verified information and for making the adjustment for the account receivables.

The Court is remanding the final result of this administrative review to the ITA for correction of the erroneous deductions from ESP as requested by the ITA.

(h) *Treatment of Legal Fees as Selling Expenses.*

Samsung alleges that the ITA erred in deducting from the U.S. price the legal expenses, which were incurred by Samsung during this review period in relation to the preceding antidumping investigation, in violation of 19 U.S.C. § 1677a(e)(2).

Zenith and Unions argue to the contrary that the ITA properly made this adjustment and that Commerce erred in failing to make similar adjustments for legal expenses which were also incurred by Daewoo and Gold Star.

The ITA concedes that legal fees do not qualify as selling expenses deductible from ESP and that the administrative record of this review fails to articulate any rationale for treating the legal fees as deductible selling expenses. Furthermore, Commerce admits that no such rationale exists and that Commerce's established practice is not to consider legal fees as either directly or indirectly related selling expenses.

The Court is satisfied with Commerce's explanation that legal fees do not qualify as selling expenses, and that it would also be against public policy to make an adjustment for legal fees in calculations of dumping margins. Such practice would create artificial dumping margins and might encourage frivolous claims in order to incur legal fees which would result in increased margins.

The Court remands the final results of the administrative review to Commerce for correction of this erroneous deduction with regard to the legal expenses incurred by Samsung.

(i) *Export-related Selling Expenses Incurred Outside of the United States.*

Plaintiffs claim that Commerce violated 19 U.S.C. § 1677a(e)(2)[15] in deducting from ESP certain selling expenses which were not incurred within the territory of the United States. Plaintiffs do not dispute that these selling expenses relate to their export sales in the United States, but allege that only those expenses which are incurred within the United States are deductible from the U.S. price.

Plaintiffs also allege that these expenses must be reflected on the accounting books and records of exporters, rather than those of their parent companies in Korea, in order to meet the requirement of 19 U.S.C. § 1677a(e)(2) that they must be incurred "by, or for the account of the exporter in the United States".

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[15] 19 U.S.C. 1677a(e)(2) in relevant part provides:

(e) Additional adjustments for exporter's sales price. –

for purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of –

* * *

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise . . .

Defendant concedes that the ITA did limit the adjustments to those expenses which were incurred within the United States in the past. Defendant asserts, however, that the ITA has revised its administrative practice and is consistently following its current practice of making appropriate adjustments for all expenses incurred in relation to the U.S. exports.

The Court does not find that the site or location at which the selling expenses are incurred, is decisive for the purposes of making these adjustments under 19 U.S.C. § 1677a(e)(2).

In *Silver Reed America, Inc., et. al. v. United States*, 683 F.Supp. 1393 (CIT 1988), plaintiff Silver similarly contended that the inventory carrying costs which were accrued during the time the merchandise was being transported to the United States should not be deducted from the U.S. price, because these expenses were not incurred in the United States. The court in *Silver* upheld the defendants' position, however, that "the phrase 'in the United States' does not limit the word 'incurred,' and [that] in any event § 1677a(e)(2) was not intended to limit the deductibility of selling expenses, incurred by or on behalf of the exporter, that are related to United States sales." *Id.* at 1396. We adhere to the conclusions reached by the court in *Silver Reed* for the following reasons.

The U.S. price of the merchandise can be based on either "the purchase price, or the exporter's sales price [ESP] of the merchandise, whichever is appropriate." 19 U.S.C. § 1677a(a).

The statutory distinction between the purchase price, the price at which the merchandise is purchased by a U.S.

purchaser, and the exporter's sales price, the price at which the merchandise is sold to a U.S. purchaser, would not be very meaningful, but for the emphasis on the additional selling activities conducted by foreign exporters in ESP situations in order to sell their merchandise in the United States.

Consequently, 19 U.S.C. § 1677a(e) provides for adjustments which have an equalizing effect of removing these additional selling expenses from the U.S. price. These adjustments have the effect of converting ESP into a regular purchase price so that the U.S. price in both situations could be measured "at the specific, 'common' point in the chain of commerce" when the merchandise is leaving the "factory gates." *Smith-Corona Group, SCM Corp. v. United States*, 713 F.2d 1568, 1572 (CAFC, 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984).

This statutory construction reflects an economic presumption that exporter's sales price must contain a built-in surcharge to reflect these additional selling expenses which must be stripped from the ESP, in order to make a fair price comparison. If the foreign exporters do not adequately raise their U.S. prices to cover these additional selling expenses, the adjusted ESP would accurately reflect this unfair practice.

This provision reflects a clear Congressional mandate to account for the additional selling activities by the foreign exporters in selling the merchandise in the United States. This requirement does not change merely because these additional export-related selling expenses happen to be incurred and financed by the exporters' parent

companies in the country of exportation. Congress specifically provided that these expenses could be made either by the exporters themselves, or by other unspecified entities "for the account of the exporter in the United States". 19 U.S.C. § 1677a(e)(2). When some export-related activities and their costs are absorbed by the exporters' parent companies, it is fair to conclude that they were incurred for the account of the exporter in the United States.

The legislative history of this provision, as well as its intended purpose, indicate that the only geographic requirement with regard to these expenses is their relation to sales in the United States. The Senate Report accompanying the enactment of the provision's predecessor in the 1921 Antidumping Act, which is not modified with respect to this issue, stated:

> In substance, the term "exporter's sale price" is defined in such manner as to make the price the net amount returned to the foreign exporter.

S.Rep. No. 16, 67th Cong., 1st Sess. 12 (1921).

Since the definition of the foreign exporter includes both the foreign manufacturer and its selling subsidiary in the United States, this statement indicates that all U.S. export related expenses were intended to be deducted in order to determine the net amount of the U.S. price.

Similarly, the testimony during the debate over this provision states:

> [An] appraiser [currently, the ITA] can disregard the apparent sales price and take the sales price of the importer in the United States, and after subtracting from that price the expenses *incurred in placing the merchandise in the market of the*

> *United States,* will reach the real sales price at which the merchandise entered into competition with comparable merchandise *in the United States.*

59 Cong.Rec. H328 (daily ed. Dec. 9, 1919) (Remarks of Rep. Fordney) (emphasis added). This statement indicates clearly that the selling expenses do not have to be incurred in the United States, but have to be made *"in placing* the merchandise for sale in the United States." *Id.* (emphasis added).

The alternative allegation of plaintiffs that in order to be incurred by or for the account of the exporter in the United States, these expenses must be reflected on the U.S. exporters' accounting books and records is impermissibly narrow and clearly erroneous. It substitutes the technical meaning of the term "for the account" as used in the accounting profession for the common meaning of the term. The phrase "by, or for the account of the exporter" commonly means that the expense may be incurred on behalf of the exporter. The context of the provision in question does not indicate that the strict accounting meaning of the term "for the account", so that these expenses should be reflected on the exporters' records, was intended by Congress.

The Court is satisfied that the current interpretation of this provision by the ITA is reasonable and is in compliance with the Congressional intent and purpose of the law. The Court affirms the final results by the ITA in making an adjustment for selling expenses which are incurred by plaintiffs in Korea in connection with their sales of the merchandise in the United States.

(j) *Deduction Of Pre-Sale Credit Expenses From ESP*

Plaintiffs Daewoo, Gold Star and Samsung allege that the ITA erred in adjusting the exporter's sales price for imputed credit expenses which are incurred between the time the merchandise is exported from Korea and the time it is sold by their U.S. Subsidiaries to unrelated purchasers in the United States.

Plaintiffs allege that this practice is unfair because it is inconsistent with the ITA's practice of disallowing a parallel adjustment to FMV for pre-sale credit expenses in the home market, and that only the actual, rather than imputed selling expenses may be deducted from ESP. According to plaintiffs, this disparity in treatment between pre-sale credit expenses in the home market and those in the United States represent an arbitrary abuse of the agency's discretion.

A separate argument with regard to the measurement of pre-sale credit expenses for the purposes of ESP calculations is raised by Zenith and Unions as plaintiffs in a consolidated action. Zenith and Unions defend Commerce' [sic] practice of making the adjustment for inventory carrying costs to ESP.

With regard to the measurement of the inventory carrying costs, Zenith and Unions allege, however, that Commerce improperly applied the home market interest rate, rather than the higher United States interest rate, to a portion of the inventory carrying period when the merchandise entered the United States and was awaiting its sales to unrelated U.S. purchasers.

After examining whether this difference in treatment of the credit expenses in calculating the U.S. price and FMV is warranted by the antidumping law, the Court does not find any support for the allegations of plaintiffs.

The actual issue before the Court is whether 19 U.S.C. § 1677a(e)(2) requires an adjustment to ESP for these pre-sale credit expenses, and whether these are *additional* selling expenses which the exporters would not have to incur, but for the exportations of the merchandise to the United States for sale by their U.S. subsidiaries.

The legislative history discussed in the previous section explains the obvious rationale behind the deductibility of the additional selling expenses which are incurred by exporters in ESP situations. In purchase price transactions, when the first unrelated U.S. purchaser buys the merchandise from the exporters in their home country, the exporters do not have to finance the merchandise while it is en route to the United States and while it is held in the warehouses of their U.S. subsidiaries. In ESP situations, however, exporters are bound to incur these additional inventory carrying costs.

The Court also finds that these additional expenses are assumed to be actually incurred by financing and maintaining the merchandise, even though no specific entries with regard to these carrying cost may be found on the exporters' books and records. The practice of imputing these expenses by the ITA is a process of measuring these actual expenses, rather creating them artificially or arbitrarily.

The Court is not convinced by the plaintiffs' argument that the ITA's failure to make a similar deduction

for pre-sale credit expenses from FMV results in unfair comparison. Section 773 of the Act controls calculations of FMV and provides a separate method of accounting for different selling expenses which are incurred with regard to the merchandise sold in the home market. 19 U.S.C. § 1677b. It would be inappropriate to invalidate a legitimate adjustment to ESP merely because no similar adjustment is generally made in calculations of FMV.

The Court finds neither statutory, nor equitable grounds in this case to require the exact same treatment of pre-sale credit expenses in the calculations of both exporter's sales price and foreign market value, which are completely different in nature.

In the Final Results of this administrative review, the ITA properly explained:

> We disagree that we are inconsistent in not adjusting for interest expenses incurred during the pre-sale inventory period in the home market while reducing United States price by the interest costs incurred from date of shipment to date of sale. From both United States price and foreign market value we deduct the cost for the period from date of shipment from warehouse in the home market to date of payment by the unrelated customer.

49 Fed.Reg. at 50427.

The Court finds that the "pre-sale" period in ESP sales and sales in the home market cannot be treated equally. In ESP situations, the statute does not allow for a determination of the U.S. price based on transaction prices between related parties, the foreign manufacturers and the U.S. selling subsidiaries. The sale to the first

unrelated U.S. purchaser is treated as the actual sale of the merchandise. At the same time, the pre-sale period in ESP situations in fact includes a sale between the related parties with additional shipping, financing and selling costs, which are not part of pre-sale expenses in the home market. The Court finds that Commerce is required to treat these ESP pre-sale expenses differently in order to make a fair comparison. *See, Smith-Corona, supra.*

Zenith alleges that in the subsequent administrative review, which is not subject to this action, Commerce has divided the pre-sale inventory period into domestic and U.S. portions and applied domestic and U.S. interest rates respectively. Consequently, Zenith alleges that the ITA erred in failing to apply the same methodology during the administrative review in question.

The Court will not address this allegation of Zenith, because it extends beyond the scope of this judicial review. The standard of judicial review under 19 U.S.C. § 1675 is limited to the administrative record of the final results subject to this action. The argument of Zenith is based on the events of the subsequent review period which is not now before this Court and with regard to which no administrative record is available for review.

The Court affirms the final results with regard to the additional adjustments to ESP for imputed inventory carrying costs as reasonable and in accordance with the law.

III. PROCEDURAL CLAIMS.

(k) *Section 737(a) Assessment Cap.*

Plaintiffs contend that Section 737(a) of the Act imposes a limitation on the amount of duties to be assessed as a result of this administrative review and that the duty assessed on entries which were made prior to the final determination of the ITC may not exceed the rates established in the preliminary determination of the initial less-than-fair value investigation.[16] In particular, Daewoo asserts that Commerce has violated both Sections 737(a) and 735 of the Act when it raised the preliminary estimated duty deposits rates immediately after its final determination in the initial LTFV investigation. Daewoo argues that Section 735 of the Act applicable to final determinations contains no authorization to modify the estimated duty deposit rates which are established in

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[16] 19 U.S.C. § 1673f. **Treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order**

(a) **Deposit of estimated antidumping duty under § 1673b(d)(2) of this title.** – If the amount of a cash deposit collected as security for an estimated antidumping duty under § 1673b(d)(2) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under § 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under § 1673d(b) of this title is published shall be–

(1) disregarded, to the extent the cash deposit collected is lower than the duty under the order, or

(2) refunded to the extent the cash deposit is higher than the duty under the order.

the ITA preliminary determination at the initial LTFV investigation. 19 U.S.C. § 1673b(d). Consequently, Daewoo contends that Commerce was required to continue to collect deposits at the same preliminary rates until the date of publication of the ITC final injury determination, and then to disregard any difference between these estimated preliminary rates and the actual assessment rates of this administrative review pursuant to Section 737(a) of the Act.

Plaintiffs cite one administrative decision, *Fireplace Mesh Panels from Taiwan*, 48 Fed. Reg. 31279 (1983), in which the ITA agreed with plaintiffs' interpretation of Section 737(a) of the Act. In response to a comment from an interested party in that administrative review, the ITA stated that it will limit the actual assessment rates for all entries made prior to the final determination of the ITC by the rates of estimated duties which were established in the initial less-than-fair value determination. Plaintiffs argue that by raising the rates of deposits immediately after its final LTFV determination, the ITA had indicated conclusively that it did not intend to limit the assessment of antidumping duties by the preliminary rates.

Defendant did not state its position with regard to this issue in its brief, but requested the Court to remand this issue to the ITA. The ITA did not concede its error, but requested a remand in order to address this issue and make a decision with regard to the proper interpretation of Section 737(a) of the Act.[17]

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[17] The ITA requested a remand in order to make "whatever decision it may make", Deft Brief at 13.

Zenith and Unions, on the other hand, dispute plaintiffs' arguments on the merits and request this Court to rule on this issue without remanding it to the ITA.

Since the ITA requested a remand without stating its position with regard to its interpretation of Section 737(a), and without admitting an error, the Court ordered the ITA to provide "a memorandum of points and authorities explaining the legal position and the administrative practice of the ITA with regard to the application of 19 U.S.C. § 1673f".[18]

In the Memorandum, the ITA confirmed its interpretation of Section 737(a) of the Act as follows:

> It has been our longstanding practice . . . that two provisional measures assessment rate caps govern the liquidation of entries or withdrawals of merchandise between our preliminary affirmative determination and the ITC's final injury determination. As explained below, Section 737(a) of the Act permits us to adjust the provisional measures assessment rate cap based on our final affirmative LTFV determination.[19]

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[18] *See*, Order dated May 31, 1988. The ITA misunderstood the Court's Order, and instead of a legal memorandum, it filed a document entitled *Results of Remand of Final Results of Antidumping Duty Administrative Review, Color Television Receivers from Korea, Pursuant to Court Order in Daewoo Electronics Co., et al. v. United States*, dated June 28, 1988 (the "Memorandum"). Since the Court never remanded this issue to the ITA, this document will be treated as a legal memorandum.

[19] *See* Memorandum at 4-5, footnote omitted.

After a careful consideration of the intricate statutory scheme under review, the Court finds the agency's position with regard to the application of Section 737(a) of the Act is reasonable and is otherwise in accordance with the law.

The statutory scheme of the Act provides for a series of findings and determinations by the administering agency before the actual antidumping duty may be assessed on the entries of the subject merchandise. The actual assessment of antidumping duties does not occur until Commerce conducts its first administrative review of entries subject to an antidumping order.

The Court finds that Section 737(a) of the Act does not impose a limitation on the actual assessment rate by the rates established in the ITA preliminary determination, but requires only that the amount of duties assessed on entries made prior to the ITC final determination should be "disregarded, to the extent *the cash deposit collected* is lower than the duty". 19 U.S.C. 1673f(a)(1), (emphasis added).

Section 733(d)(2) of the Act contains an authorization to suspend liquidation of the subject entries and to collect deposits of estimated duty as part of the affirmative preliminary determination of the initial investigation. The reference to this authorization in Section 737(a) does not limit Commerce's authority to adjust those preliminary rates in their subsequent final determination in LTFV investigations.

Commerce properly refers to the legislative history of Section 733(d)(2) of the Act with regard to preliminary

determinations which authorizes initial suspension of liquidation and collection of deposits, and states that these preliminary deposit rates could be adjusted "when more accurate information becomes available".[20] Secondly, Commerce provides a reasonable explanation of its position by reference to Section 735 of the Act.[21] This section authorizes the agency to suspend liquidation and collect cash deposits immediately after its final determination in cases where a preliminary determination of the ITA has been negative. The Court finds this provision very instructive in that it authorizes the ITA to order suspended liquidation of the subject merchandise immediately after its final determination by reference to Section 733(d) with regard to preliminary determinations. This reference to the authorization provision of Section 733(d) of the Act indicates that that provision granted Commerce a continuing authority to suspend liquidation and to collect estimated duty deposits.

This provision indicates that the ITA has the authority to collect updated deposits in the amount at which foreign market value of the merchandise exceeds its U.S. price and to make a corresponding change in the deposit

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[20] *Id.*, at 7, citing S.Rep. No. 96-249, 96th Cong., 1st Sess. 65 (1979), U.S.Code Cong. & Admin. News 1979, 381.

[21] 19 U.S.C. § 1673d(c)(1)(B) states:

> (B) in cases where the preliminary determination by the administering authority under section 1673b(b) of this title was negative, the administering authority shall order *under paragraphs (1) and (2) of section 1673b(d)* of this title the suspension of liquidation and the posting of a cash deposit, bond or other security. (emphasis added.)

rates when the ITA perfects its calculations as a result of its final determination.[22]

The Court does not agree, therefore, that Section 737(a) of the Act limits the actual assessment of antidumping duty to the preliminary rates of estimated duty. If the merchandise was entered prior to the final determination, the rates established in the ITA preliminary determination would serve as an assessment cap. Conversely, if the merchandise is entered after the preliminary rate was raised as a result of the final determination, that higher rate would serve as the limit of the actually assessed duties for all those entries which have been made prior to the final injury determination of the ITC pursuant to Section 737(a) of the Act.

Plaintiffs' reliance on *Antidumping Code on Implementation of Article VI of GATT* (the "*Antidumping Code*") is confused. The Court does not find any conflict between this international agreement and its implementing provision in Section 737(a) as interpreted by the ITA.

The relevant provision of Article 11 of the *Antidumping Code* states that

> If the antidumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected.

Plaintiffs' interpretation of this provision equates the term "provisionally paid duty" with preliminary rates of duty to the exclusion of the rates established in the final

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[22] The ITA indicates that it would ordinarily do so even when the amount of security has to be adjusted downward. *See* Memorandum at 8, footnote 5.

determinations of the ITA. Plaintiffs ignore the provisional nature of duties which are imposed as a result of the final determination and which also serve merely as estimated duty until the actual assessment rates are established as a result of the administrative review. Pursuant to the definition of "provisionally paid duty" of the *Antidumping Code*, both the ITA preliminary and final rates of the duty in the initial LTFV investigation represent provisionally paid duty.[23]

Finally, plaintiffs' interpretation of this provision would render meaningless the meticulous calculations required under the Act in both the final determinations of LTFV investigations and final results of the first administrative review. The Court does not find that Congress intended this absurd result. The Court affirms Commerce's interpretation and application of Section 737(a) of the Act.

(l) *The Disclosure Requirement.*

Daewoo and Gold Star allege that the ITA improperly refused to disclose the computer programs and printouts which contained calculations of the final results of this administrative review.

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[23] Article 10 of the *Antidumping Code* provides that

> Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond – equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping.

The ITA and defendant-intervenors contend that this issue is moot, because plaintiff, as a result of bringing this action, have obtained access to the documents in question as part of the administrative record filed with this Court under the judicial protective order.

Plaintiffs contend that the issue as to whether the ITA is required to release the computerized information at the end of the administrative proceeding is capable of recurrence, and, therefore, it should not evade judicial review on the ground of mootness.

The Court agrees with plaintiffs' arguments that the ITA failed to carry the burden of demonstrating mootness by establishing that (1) there is no reasonable expectation that the same issue will recur and that (2) interim relief has completely and irrevocably eradicated the effects of the alleged violation and the parties' interest in the underlying question of law. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979).

The Court is aware that the final results of this administrative review are subject to judicial review independently of other stages in the administrative process. At the same time, there are legal issues which affect conduct of the parties throughout these independent stages of the administrative process. The Court prefers to address such issues as soon as they arise in order to give parties the benefit of any early resolution of issues which could hamper the administrative process.

Because the ITA is required to file a complete administrative record every time it is challenged in this Court, the parties seeking access to the documents which are

contained in the administrative record will automatically receive it under the protective order of this Court. If obtaining the access to the ITA calculations is the main issue in a court action, the case would automatically become moot as soon as the administrative record is filed and the protective order is issued. It simply does not make any sense to require parties to initiate a court action in order to obtain access to calculations which form the basis of the ITA determinations.

The Court finds that the parties' access to computer programs and printouts as part of the administrative record of this legal action does not dispose of the urgent issue as to whether the ITA is required to provide parties with a timely disclosure of the computer programs and printouts as part of the administrative process and before a legal action is commenced in this Court.

The Court finds that Commerce is required to disclose, not only the basic facts and conclusions of law, which form the basis of the final results as published in the *Federal Register*, but also the actual calculations of the dumping margins used during the process of manipulating the factual data in accordance with the law. These calculations are an essential component of the final results and a crucial part of the determination of the actual amount of antidumping duties to be assessed on the subject merchandise.

Section 777 of the Act, 19 U.S.C. § 1677f, is clearly designed to give parties access to the information which forms the basis of determinations by the ITA throughout

the administrative proceedings, provided that the necessary precautions against unauthorized disclosures of proprietary information are taken. The ITA is required to establish and follow a procedure which will provide the parties with the necessary access to various documents including the computer programs and printouts which form the basis of the ITA determinations.

(m) *Clerical Errors in Calculation of the Final Results.*

Daewoo and Samsung allege that the ITA made a number of errors in calculations of the final dumping margins. Commerce concedes that the final calculations contain some inadvertent omissions and inconsistent transactions, and requests the Court to remand this determination for corrections.

Zenith and Unions object to a remand for the purpose of correcting the clerical errors on the ground that most of these errors are not clerical errors, but rather the preferred methods of calculations intentionally utilized by the ITA.

The Court will not address each specific error alleged by plaintiffs in view of Commerce's admission of the errors. The Court remands the determination to Commerce for correction of clerical errors.

IV. ADDITIONAL ARGUMENTS OF ZENITH AND UNION.

(n) *Adjustment for Taxes Forgiven upon Exportation.*

Plaintiffs Zenith and Union allege that the ITA violated the express requirement of Section 772(d)(1)(C) of

the Act,[24] when it deducted from FMV the amount of certain Korean taxes, which were forgiven upon exportation of the merchandise to the United States, instead of adding these taxes to the U.S. price of the merchandise. Similarly, plaintiffs allege that the ITA failed to limit the amount of this adjustment by the extent to which "such taxes are added or included in the price of such or similar merchandise when sold in the country of exportation" in violation of the same provision of the law. *Id.*

In support of their arguments, plaintiffs rely on *Zenith Electronics Corp. v. U.S.* 633 F.Supp. 1382 (CIT 1986) [sic] in which this court upheld plaintiffs' position with regard to the exact same issues.

The ITA admits that it departed from both the literal application of this provision in the statute and this court's interpretation of that provision in *Zenith.*[25] Commerce

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[24] 19 U.S.C. § 1677a(d)(1)(C) states:

> **(d) Adjustments to purchase price and exporter's sales price.** – The purchase price and the exporter's sales price shall be adjusted by being –
>
> (1) **Increased by –**
>
> * * *
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; . . . .

[25] Defendant's Brief in Opposition to the Motions of Zenith and Unions for Judgment upon the Agency Record (the "ITA Brief II") at 7.

justifies its continued adherence to the interpretation which was rejected by the court by repeating the same argument which was raised in *Zenith*, namely, that a literal application of Section 772(d)(1)(C) of the Act would artificially inflate dumping margins in conflict with the Congressional purpose of this section to achieve a tax-neutral computation of dumping margins. Commerce persists "that the ITA's treatment of taxes which have been rebated or forgiven upon exportation is rational and lawful and should have been sustained by the Court in *Zenith*".[26] In addition, Commerce states that the agency has not developed an alternative methodology, because the decision in *Zenith*, did not yet become final. As an alternative to reconsidering the court's decision in *Zenith*, the ITA requests this Court to abstain from remanding this issue to the agency for redetermination until such time as the judgment of this court in *Zenith* becomes final and a new methodology to implement it can be developed by the ITA.

Daewoo and Gold Star attempt to defend the ITA's position by distinguishing the facts of this case from those in *Zenith*. They allege that unlike the Japanese commodity tax involved in *Zenith*, there is substantial evidence on the record that the Korean taxes in question are added to and included in the price of the merchandise in the home market and that the adjustment for the full amounts of these taxes was, therefore, in accordance with the law. This argument, however, does not address the requirement of Section 772(d)(1)(C) that this adjustment has to be determined with regard to the value of the

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[26] *Id.*, at 9.

exported merchandise and has to be added to the U.S. price, rather than deducting the amount of taxes imposed on sales in the home market from FMV. Furthermore, the argument of Daewoo and Gold Star that the Korean taxes, unlike the Japanese commodity taxes in *Zenith*, were actually passed-through to Korean purchasers of the merchandise would be relevant if the ITA made such determination in calculating the adjustment. The ITA notice of the final results and the administrative record of this case indicate, however, that Commerce did not attempt to make any such determination, but merely assumed that taxes were passed-through as the best information available. The court held in *Zenith* that the ITA could not make such an assumption without actually attempting to determine whether these taxes were shifted to Korean purchasers according to the specific requirement in the law.

The Court will refrain from revisiting the same issues which we addressed in great detail and disposed of in *Zenith, supra.* The ITA does not raise a single argument or factual distinction, which was not addressed in that case, and has not demonstrated the need for reconsideration of those issues. In *Fundicao Tupy et. al. v. U.S. et. al.*, 13 CIT ___, 696 F.Supp. 1525 (1988), the court refrained from addressing the issue as to whether a preliminary injunction should issue with regard to new entries of merchandise when the same relief was denied to the moving party with regard to the entries made during a preceding review period. The court stated: "Since the Court of Appeals has now assumed jurisdiction over this matter, we do not believe that it would be appropriate for this Court to conduct an intra-court review of its previous

decision by revisiting these issues." *Id.*, at 9 (footnote omitted).

Similarly, the Court will not delay resolution of this issue within the context of this judicial review, merely because defendant is pursuing an appeal of a judicial precedent which remains controlling until it is overturned. The Court will not allow the ITA to continue rewriting the express requirements of the statute without even attempting to obtain and meet the criteria of the proper procedural relief.

The Court finds that the *Zenith* case is controlling in its holding and reasoning that Commerce's interpretation of Section 772(d)(1)(C) of the Act is not in accordance with the law and that the final results of this administrative review are not supported by the evidence on the record with regard to this issue. The Court remands this issue to the ITA for reconsideration in accordance with this opinion.

(o) *Calculation of the Deposit Rates for Future Entries.*

Zenith and Unions argue that the ITA method of calculating the amounts of antidumping duty deposit requirements on future entries of CTRs from Korea violates the legislative purpose and the requirement to collect duties and deposits in the amount by which FMV exceeds U.S. price. Zenith alleges that the straight application of the antidumping duty percentage rates to the invoice prices at which CTRs are entered to the United

States ("entered value"), rather than the adjusted or "statutory U.S. price" understates the amount of the deposit requirement.

Zenith contends that the deposit requirement is clearly understated in this case, because the statutory U.S. price of the CTRs is substantially higher than its entered value as a result of the adjustments for Korean taxes which are not collected or rebated with regard to this merchandise upon its exportation to the United States. According to Zenith, therefore, the application of the same percentage rate to the lower amounts of unadjusted entered value of CTRs yields inaccurate and disproportionate amounts of antidumping duty deposit requirements in violation [sic] the purpose and intent of the antidumping duty law.[27]

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[27] Zenith provides the following example to demonstrate the understatement of the deposit requirement:

For example, assume Commerce reviewed only one entry of on Korean CTV [CTR] sold in the review challenged herein. Further, assume that (a) the entered value of that single entered CTV set was $100; (b) Commerce, in calculating statutory USP, added to the $100 entered value approximately $50 as a forgiven tax add-back (in accordance with Zenith's argument *supra* at 8-12), yielding a USP of $150; (c) the comparison FMV is $175, yielding a dumping margin of $25; and (d) the weighted-average percentage margin of dumping on this CTV is, therefore, 16.67 percent ($25 dumping margin as a percentage of $150 statutory USP).

Now, assume that, on the day after this result is published in a final determination, there is a new, one set entry of this same Korean CTV model, again at an entered value of $100. Using Commerce's weighted-average percentage dumping margin (16.67 percent) as determined in the just-completed review, the Customs Service would require a cash deposit of only $16.67

The ITA, Daewoo, Gold Star and Samsung allege that this argument should be precluded from being raised in this judicial review, because Zenith and Unions failed to exhaust the administrative remedies by raising this issue during the proceeding below.

Alternatively, Commerce disputes this argument on the merits by stating that it is based on the erroneous premises that the adjusted U.S. prices of the merchandise will always be higher than its entered value and that there is no authorization to rely on the "entered value" of the merchandise. Commerce argues that there is no legal or factual basis for determining whether the deposit rates are understated or overstated until the future entries are reviewed and the actual antidumping duty rates for those entries is calculated. Commerce further alleges that the statutory deposit requirement was never intended to, and could not possibly represent the exact estimate of the antidumping duties which might be due on the future entries of the merchandise and that Congress provided for collection of the difference between the duty deposited and the duty ultimately assessed on the merchandise with interest. 19 U.S.C. § 1673f.

(16.67 percent of entered value) for an estimated antidumping duty. However, the most recent and best information available indicates that the future dumping margin and antidumping duty liability on this new entry will be $25. The proper way to calculate the deposit rate is to express the just-determined antidumping duty ($25) as a percentage of the reviewed entry's entered value ($100), which would have yielded a 25 percent deposit rate and an accurate $25 cash deposit for an estimated antidumping duty on the new entry.
Brief in Chief of Zenith at 13.

The Court does not agree that Zenith is procedurally precluded from raising this issue in this judicial review. It is not until the final results of the review became published that the basis for this argument arose. It is particularly true in view of the fact that the ITA did not make, and is still opposing, the upward adjustment to the U.S. price for Korean taxes forgiven upon exportation, which would make the statutory U.S. price of the merchandise considerably higher than its entered value.

At the same time, the Court does not find any support for the argument of Zenith that the ITA violated its discretion in calculating *ad valorem* duty deposits by applying the weighted-average rates of antidumping duty to the entered value of the future entries of the merchandise.

The Court finds that it would be both speculative and cumbersome for the ITA, in addition to determining the adjusted U.S. price of entries made during this review period, to make a special finding as to what such adjusted U.S. price might be for the future entries and to convert the current rate of antidumping duty to reflect such estimated adjusted U.S. price.

It would also be speculative to assume that the adjusted U.S. price of the future entries would indeed be increased in the same proportion as in the final results of this review. The statutory U.S. price is subject to various upward and downward adjustments which depend on many factors to be determined during a future review. Until the ITA conducts such a review and determines the adjusted U.S. price for the future entries, it is within Commerce's discretion to apply the rates of these final

results to the entered invoice value of the future entries without any additional conversions to account for the difference between the entered value of the merchandise and the adjusted U.S. price to be determined in the future.

The Court concludes that the ITA is reasonably in compliance with Section 751(a)(2) of the Act in applying the rates established in the final results of the subject administrative review to future entries of the merchandise on an ad valorem basis. The Court affirms the final results of the ITA with regard to this issue.

(p) *Adjustment for Rebates in Determination of Sales Below Cost.*

Zenith claims that Commerce failed to account for certain rebates, which were made by Daewoo on its home market sales of the merchandise, in determining whether the home market sales of the merchandise were made below their costs of production. Zenith alleges that many more sales would be excluded from FMV as below costs sales, if the ITA made the proper adjustments for the amount of rebates.

The ITA concedes that it erred by inadvertently omitting the rebates from its below costs analyses and requests a remand to correct this omission.

Daewoo does not defend the ITA's omission of rebates from the costs of production calculations in view of the agency's request for a remand. At the same time, Daewoo states that these rebates should not be classified

as indirect selling expenses, which are added to the overall costs of producing the merchandise, but instead must be considered an aspect of the net sales. Daewoo also advances a number of specific methodologies with regard to calculation of the rebate adjustments, should the Court order a remand.

The Court will not proscribe specific methods of calculating the rebate when remanding this issue to the agency. The specific method of calculating the rebate is not ripe for judicial review. The action challenges the ITA's failure to make an adjustment and the Court shall limit its ruling to this issue. Once Commerce has performed the remand and reported its result to this Court, Daewoo will be able to raise these arguments, if it believes that the remand results are not supported by substantial evidence on the record, or otherwise not in accordance with the law.

The ITA must address this issue on remand and allow the parties to submit their comments with regard to this adjustment.

(r) *Failure to Account for a Second Nameplate on Exported CTRs.*

Zenith alleges that the ITA failed to account for the expense of installing a second nameplate on CTRs which were sold by Gold Star in the United States. The ITA does not dispute that these additional nameplates were not installed on CTRs which were sold in the home market.

Zenith argues that, if U.S. price was based on purchase price, the ITA was required to account for the

expense of installing the second nameplate on export merchandise by making a difference in merchandise adjustment to FMV pursuant to 19 U.S.C. § 1677b(a)(4)(C). Alternatively, Zenith contends that in transactions involving exporter's sales price, the added value of these additional nameplates should be deducted from the U.S. price pursuant to 19 U.S.C. § 1677a(e)(3).

Commerce concedes that it did not make any determination with regard to this issue during the administrative proceeding below. Commerce asserts, however, that this issue should not be addressed by the Court, because plaintiff failed to raise it during the administrative review in question.

The Courts finds that the applicable law requires Commerce to make certain adjustments in its calculations of dumping margins whether or not they were specifically requested by the parties to the proceeding. The ITA's admitted failure to consider this adjustment, notwithstanding the evidence on the record that the CTRs sold in the U.S. market contained these additional nameplates, indicates that the final results are not in accordance with law and not supported by substantial evidence on the record. Since there is no showing that Zenith's failure to raise this issue during the administrative proceeding had prejudiced defendant in any way, the Court will not accept the argument that a failure to raise this issue during the review precludes the Court from reviewing the final results with regard to this issue.

The Court concludes that the ITA's failure to consider the cost of the additional nameplates affixed to the exported CTRs of Gold Star render the final results

unsupported by substantial evidence on the record. The ITA is directed to address this issue on remand and make the appropriate adjustments in accordance with the law.

CONCLUSION

In summary, the Court remands the final results of the administrative review on CTRs from Korea to the ITA for reconsideration in accordance with this opinion with regard to:

(1) the appropriate adjustment to FMV for bad debt losses of Samsung;

(2) treatment of Daewoo's sales below cost of production;

(3) adjustment for the differences in import duties on the parts of CTRs;

(4) adjustment to FMV for the differences in credit expenses of Daewoo and Samsung;

(5) adjustments to FMV for warranty expenses and volume rebates of Samsung;

(6) recalculation of the ESP off-set adjustment to FMV for indirect selling expenses;

(7) reconsideration of the adjustments to U.S. price for the account receivables;

(8) reconsideration of the adjustment to U.S. price for legal expenses;

(9) adjustment to U.S. price for taxes forgiven upon exportation;

(10) adjustment for additional nameplates on CTRs of Gold Star;

(11) correction of clerical errors.

The ITA is required to file its remand results and the administrative record in support thereof within 120 days from the date of this decision. The final results of this administrative review are affirmed in all other respects in accordance with this opinion.

SO ORDERED.